

**BEFORE THE MONTGOMERY COUNTY
BOARD OF APPEALS**

**OFFICE OF ZONING AND ADMINISTRATIVE HEARINGS
Stella B. Werner Council Office Building
Rockville, Maryland 20850
(240) 777-6660**

IN THE MATTER OF:
DavCo Restaurants, Inc.
Petitioner

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For the Petition

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Attorneys for Petitioner

Martin Klauber, Esquire, People's Counsel

In Support of the Petition

Before: Martin L. Grossman, Hearing Examiner

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Board of Appeals Case No. S-2736
(OZAH Case No. 09-05)

HEARING EXAMINER'S REPORT AND RECOMMENDATION

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I. STATEMENT OF THE CASE

Petition No. S-2736, filed on August 6, 2008, seeks a special exception, pursuant to §59-G-2.16 of the Zoning Ordinance, to permit a fast-food, drive-through restaurant (a Wendy's) at the southeastern corner of the intersection of Vital Way and Randolph Road in Silver Spring, Maryland, in the C-1 (Convenience Commercial) Zone. The property is about 0.54 acres and is recorded as Lot 22 of the George W. Acorn's Addition to Colesville Subdivision, on Plat No. 23775. Petitioner DavCo Restaurants, Inc.¹, is the lessor of property (Exhibit 13), which is owned by Rock Mat LLC. The Tax ID is No. 05-3626020.

On September 4, 2008, notice was issued scheduling the public hearing for January 5, 2009 (Ex. 19). The hearing was postponed to February 9, 2009, by notice issued December 2, 2008.² The petition was amended twice, on December 17, 2008 (Exhibit 25) and January 16, 2009 (Exhibit 29). The amendments were duly noticed (Exhibits 26 and 31), and were routinely granted as unopposed.

There was also no opposition to the proposed special exception, although letters were received raising concerns, mostly about potential vehicular and pedestrian safety. By letters dated November 17, 2008 and January 16, 2009 (Exhibits 22 and 30), the Greater Colesville Citizen's Association (GCCA) wrote to seek additional improvements to area around the site and to address pedestrian safety issues. Following the hearing, GCCA sent a letter, dated February 22, 2009 (Exhibit 60), suggesting that the access to the site should be located further away from Randolph Road than planned. The same point was raised in a post-hearing letter dated February 21, 2009, from a citizen, Barbara Foresti (Exhibit 61). Ms. Foresti also questioned the wisdom of the planned on-site circulation system. The issues raised by GCCA and Ms. Foresti are discussed in Part II. G. of this report.

¹ Davco Restaurants is a franchise of Wendy's International, operating 158 Wendy's restaurants in the Baltimore, Northern Virginia and D.C. area. Tr. 13.

² Both notices incorrectly identified the applicable Code provision as Zoning Ordinance §59-G-2.26. They should have referred to §59-G-2.16. The Hearing Examiner finds this error to be inconsequential and concludes that notice was still adequate since, in each case, the notice identified the section as pertaining to a "Drive-in Restaurant."

Technical Staff at the Maryland-National Capital Parks and Planning Commission (M-NCPPC), in a memorandum dated January 16, 2009, recommended approval of the petition, with conditions (Exhibit 32).³ By letter dated February 3, 2009, the Planning Board for Montgomery County (Planning Board) also recommended approval of the special exception, with essentially the same conditions recommended by Technical Staff (Exhibit 35).

The public hearing in this case took place, as scheduled, on February 9, 2009. The People's Counsel participated in the hearing, and expressed his support for the petition, with the conditions and changes discussed at the hearing. Exhibit 58. No opposition appeared at the hearing; nevertheless, the record was held open till February 23, 2009, to allow Petitioner to submit slightly revised plans based on the Hearing Examiner's comments at the hearing, and to give Technical Staff and interested parties ten days to comment. On February 13, 2009, Petitioner filed revised plans to clarify way-finding on site (Ex. 59). Thereafter, GCCA and Ms. Foresti made additional comments. Exhibits 60 and 61.

On March 10, 2009, the Hearing Examiner reopened the record to explore the suggestion made in the post-hearing comments that the single access to the site should be moved to the south end of the proposed building (Exhibit 62). Submittals were received from the Montgomery County Department of Transportation (DOT -Exhibit 63), Technical Staff (Exhibit 64), Petitioner (Exhibits 65 and 67), Ms. Foresti (Exhibit 66), and GCCA (Exhibit 68). The record closed again on March 30, 2009.

As discussed more fully below, the Hearing Examiner believes that the concerns raised in this case have been sufficiently addressed at this stage, and will be resolved at subdivision. The Hearing Examiner therefore recommends that the petition be approved, with conditions.

II. BACKGROUND AND ISSUES

A. The Subject Property and Surrounding Neighborhood

³ Technical Staff's Report had a couple of typographical errors, one of which was corrected in the Planning Board letter. The hours of operation on pp. 2 and 5 should read till 11 p.m. for the dining room; and the Preliminary Plan # on page 5 should read 1-2002056A, according to Staff's e-mail of 2/5/09 (Exhibit 38). The Hearing Examiner corrected the Staff Report in the file in ink. The Technical Staff report is frequently quoted and paraphrased herein.

The subject property is located at the southeastern corner of the intersection of Vital Way and Randolph Road, in the Colesville area of Silver Spring. It is in the C-1 (Convenience Commercial) Zone. The property consists of approximately 0.54 acres of land, and has frontages on both Randolph Road (to the north) and Vital Way (to the west). At the time the Technical Staff report was written, the site was improved with a one-family dwelling, an attached garage and an outbuilding. Even at that time, all buildings on the property were vacant and boarded up. An aerial photo of the site from p. 5 of the Technical Staff report, with the then existing structures, is shown below:



Prior to the hearing, the Department of Housing and Community Affairs (DHCA) cited the property for the dangerous condition of the structures on site, and issued a condemnation notice (Ex. 40 and Ex. 41). The owner then obtained a demolition permit (Ex. 42) and removed all the structures from the site. DHCA thereafter released the condemnation notice (Ex. 43). The following photograph of Vital Way, taken from Randolph Road, shows the site in its now unimproved condition (Ex. 53):



The property is accessed from Vital Way via a single driveway. It abuts the site of a restaurant, “China Dynasty” to the south and a liquor store to the east. The subject property and the adjoining properties are zoned C-1. The site is shown below on an aerial photo and surrounding area map from page 6 of the Technical Staff report (Exhibit 32):



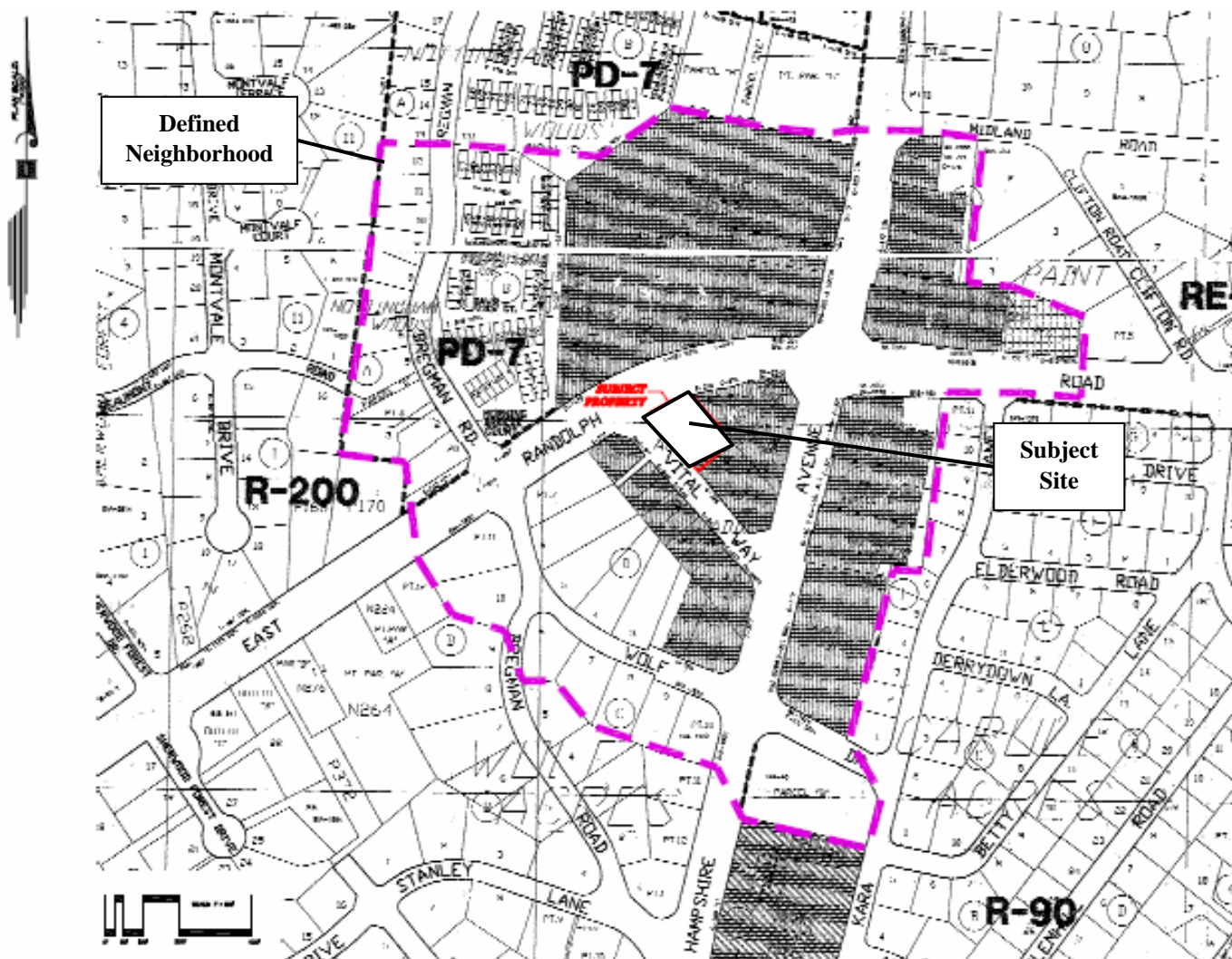
As noted by Technical Staff, Petitioner has defined the general neighborhood as bounded by the rear property lines of the properties facing on Bregman Road (west), Wolf Drive (south), New Hampshire Avenue (east) and Suncroft Court and the Colesville Center Shopping Center (north).⁴ Staff accepted this definition, as does the Hearing Examiner, because it generally coincides with the area

⁴ Neither Technical Staff nor the Petitioner’s land planner mentioned “the rear property lines of the properties facing on” each of these boundary roads, but it is clear from the lines drawn on the “surrounding area” maps they used (the one shown above and Exhibit 50) that that was their intention.

identified in the White Oak Master Plan (p. 31) as the “Colesville Commercial Center,” with the addition of adjacent residential areas that could be impacted. It thus includes all of the commercial properties adjacent to Vital Way, Randolph Road and New Hampshire Avenue, as well as residences to the south and west. Technical Staff describes the defined neighborhood, as follows (Ex. 32, p. 6):

The neighborhood is generally characterized by a mixture of residential, commercial (retail and office), and institutional uses in the C-1, PD-7, R-90 and R-200 zones. The southernmost portion of the neighborhood includes a fire station and a post office. The Colesville Shopping Center is located at the northwestern portion of the neighborhood and includes a grocery and various retail stores.

Zoning in the area can be seen on the following Zoning Map (Exhibit 59(h)):



The White Oak Master Plan (p. 30) describes the Colesville Commercial Center as “primarily a local, neighborhood retail center with some office space, a post office, and a park-and-ride facility.” It is 20.7 acres in size, and the majority of the properties have been commercially developed. The hub of the Colesville Commercial Center is the intersection of New Hampshire Avenue and Randolph Road, which is only half a block to the northeast of the subject site. Randolph Road and New Hampshire Avenue are both six lane arterials.

The Colesville Commercial Center is in the C-1 Zone. The residential areas adjacent to the Commercial Center were described by Petitioner’s land planner, Kevin Foster, in his revised Land Use Report (Exhibit 25(k), p.4):

[T]he neighborhood along Bregman Road to the south of Randolph Road [which is] part of the area known as Wolf Acres, is primarily single family homes on approximately one-half to one-acre lots and is zoned R-200. While the area north of Randolph Road and east of Bregman Road, part of the area known as Nottingham Woods, is zoned PD-7 and has higher density housing [*i.e.*, townhouses] that is on the rise west of the existing shopping center. These two residential communities and the commercial properties described comprise the neighborhood.

At the hearing, Mr. Foster testified (Tr. 47-56) that there are no residential areas adjoining the subject site, and that the area most affected by the special exception would be the Colesville Commercial Center, which includes the Giant Food Shopping Center on the northwest, miscellaneous retail on the northeast corner of Randolph and New Hampshire, a McDonald's and medical offices. On the southeast corner of Randolph and New Hampshire, there are multiple two and three story office buildings, a CVS, several banks and the Post Office. The center core or the southeast quadrant of that intersection contain a bank, a Pizza Hut, a cleaners, a Chinese Restaurant and the subject property, which is now vacant.

B. The Proposed Use

The subject application seeks a special exception pursuant to Section 59-G-2.16 (Drive-in

Restaurant) of the Zoning Ordinance to permit:

- 1) Construction of a fast-food, drive-through restaurant (a Wendy's);
- 2) Fifty employees with no more than 10 employees on site at one time;
- 3) Hours of operation: (a) dining room 10 am to 11 pm, (b) drive through window until 2 am;
- 4) Total interior floor area of 2,552 square feet (with 917 square feet of indoor patron area and 128 square feet of outdoor patron area);
- 5) Parking: 25 spaces;⁵
- 6) A monument sign near the corner of Vital Way and Randolph Road, and other signage.

The new restaurant would be called “Wendy’s Colesville,” and its relationship to its surroundings is shown in the following portion of Petitioner’s surrounding area map (Exhibits 50 and 59 (g)):



⁵ The plan approved by Technical Staff and the Planning Board prior to the hearing called for 23 parking spaces, but Petitioner had moved some tables to an area that might be considered an outdoor patron area, leading to the need for two more parking spaces. Petitioner therefore added two additional parking spaces to the site plan introduced at the hearing (Exhibit 48). Tr. 7-10. The Site plan was further revised after the hearing to address internal circulation and signage concerns. The final site plan is Exhibit 59(a), and Technical Staff did not object to the site plan revisions. Concerns about pedestrian and vehicular safety raised by GCCA and Ms. Foresti are discussed in Part II. G. of this report.

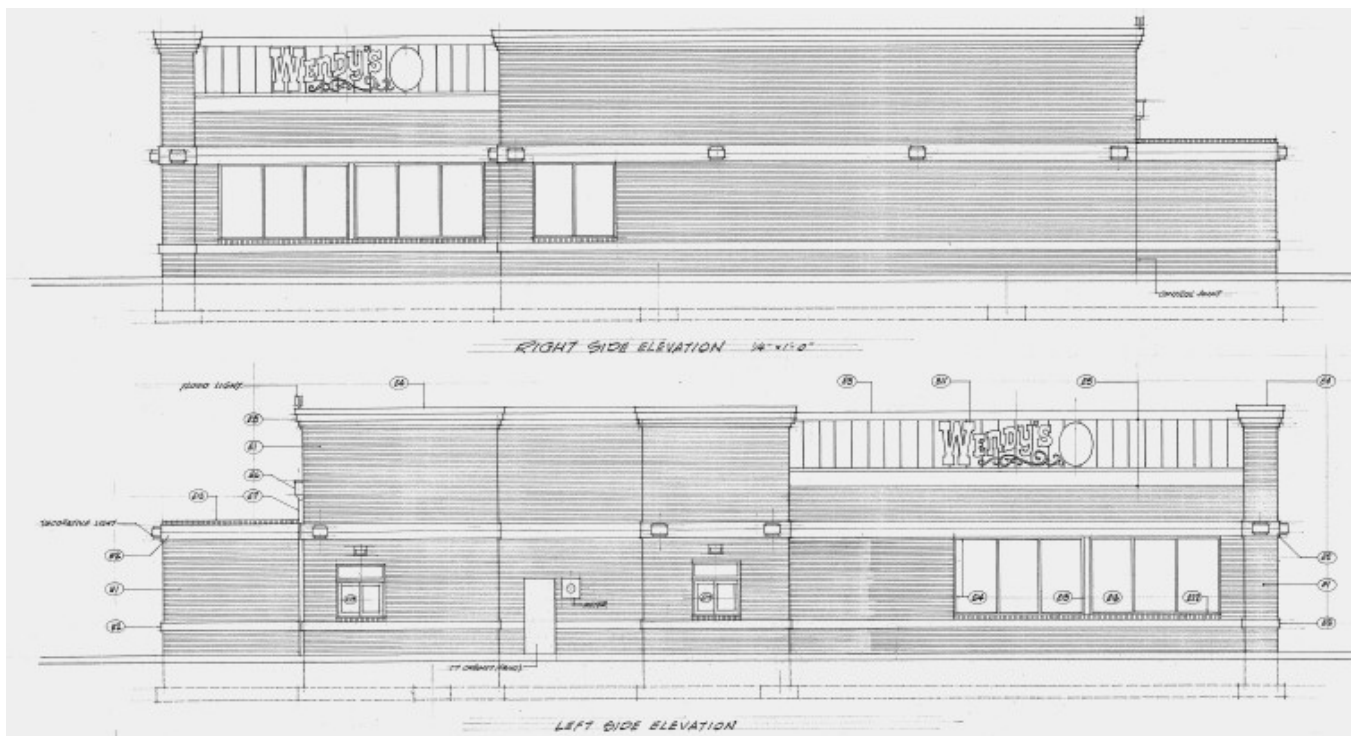
Section 59-A-2 of the Zoning Ordinance defines a “drive-in restaurant” as:

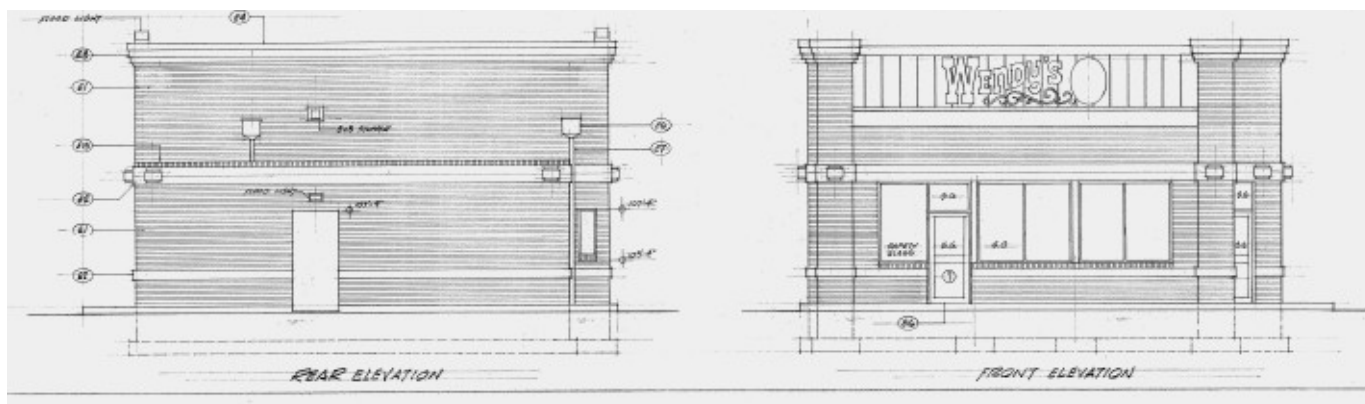
Any place or establishment merchandising or dispensing food or drink at which the customer is served:

- (a) *While sitting in an automobile or other motor vehicle, or*
- (b) *Through an interior or exterior sales window, counter or serving area, and in which a substantial part of the food or drink merchandised and dispensed has been prepared and packaged so as to facilitate its consumption outside the structure in which the food or drink is dispensed.*

Option (b) is precisely what Petitioner DavCo Restaurants, Inc. plans for the Wendy's outlet it seeks permission to build and operate on the subject site. Thomas Hughes, DavCo's Vice-President of Construction, testified that the proposed restaurant building is a standard prototype building that is used by Wendy's elsewhere in Montgomery County. Tr. 14.

Robert Saunders, Petitioner's architect, testified (Tr. 75-83) that the building, which he called the “standard 2878 building” that Wendy's uses, has a cashier window and a drive up window. It is an all brick building, with two feature strips of split face concrete, one at the sill line of the windows, and one at the head of the windows. The building elevations are shown below (Exhibit 55).





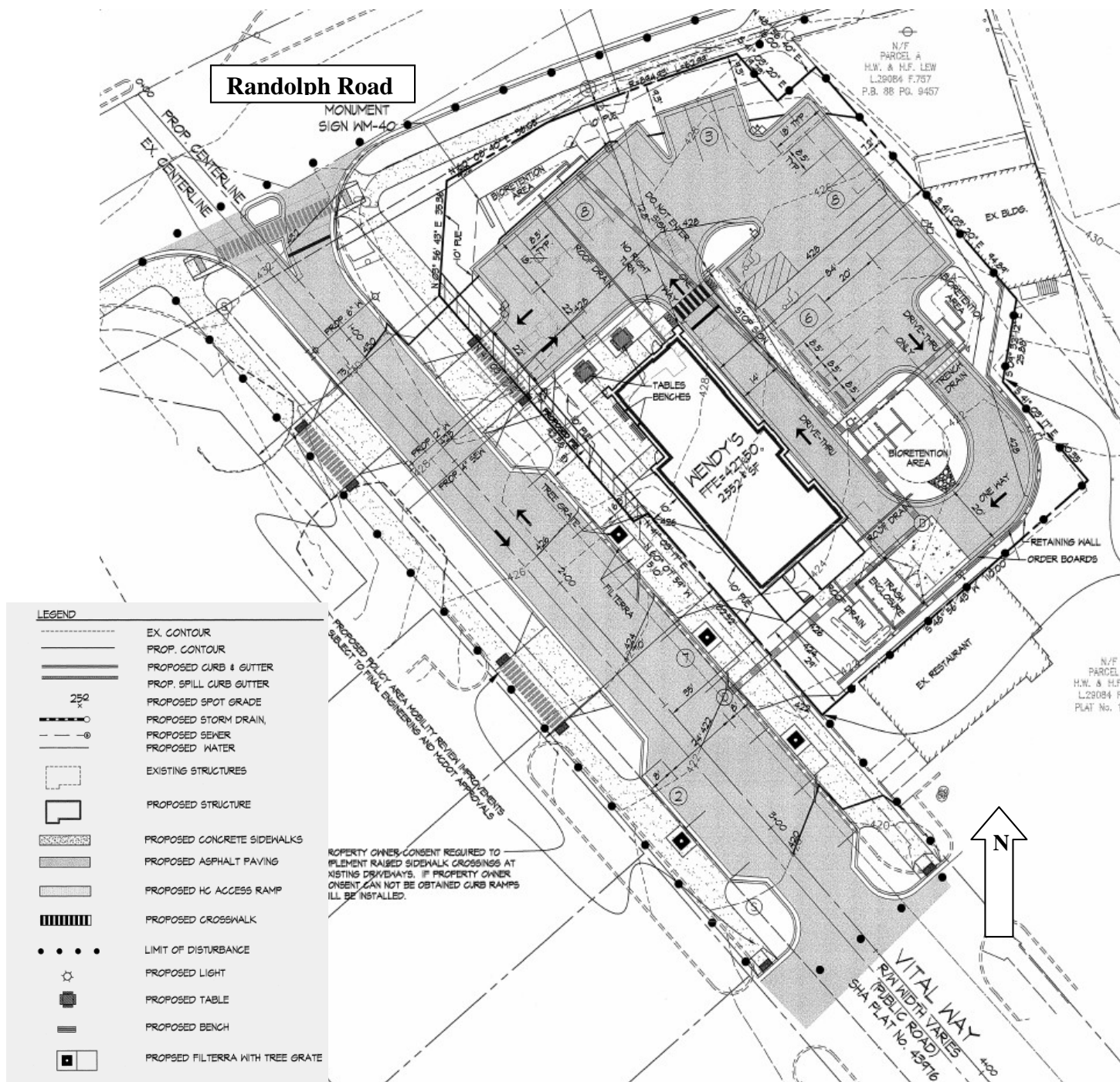
There are fascia above three sides of the dining area, which are copper colored and each of which contains a “Wendy’s” sign, as depicted above.

The height of the building, as proposed for the site, is 20 feet (Tr. 28, 30, 82), although the development standards from the revised Site Plan (Exhibit 59(a)), would allow up to 30 feet, as shown below:

DEVELOPMENT STANDARDS C-1	REQUIRED	PROPOSED
Minimum Tract Area		0.54 Acres
Building Setbacks:		
- From any public right-of-way (Randolph Road)	10 feet	10 feet minimum
- From Main Street Development (Vital Way)	0 feet	0 feet minimum
- Side (from an adjoining lot)	0 feet	10 feet minimum
- Rear (from an adjoining lot)	0 feet	10 feet minimum
- Accessory buildings	0 feet	2 feet minimum
Maximum Building Height	30 feet	30 feet
Minimum Green Area	10% (0.054 Acres)	20%
Off-street Parking Required	25 spaces 25 spaces per 1,000 sf of indoor patron area 15 spaces per 1,000 sf of outdoor patron area $(\frac{25}{1000} \times 917) + (\frac{15}{1000} \times 128) = 25 \text{ spaces}$	25 spaces
Accessible Spaces	1 space	2 spaces
Internal parking landscape area	5.0% minimum	5.0%

*NOTE: Applicant will comply with all applicable zoning requirements

The site layout from the revised Site Plan is reproduced below:



In Mr. Saunder's opinion, the architectural design of the Wendy's planned for this site will be compatible with the surrounding uses and designs. Given the commercial nature of the immediate surroundings, the Hearing Examiner agrees.

The rendered Landscape Plan (Exhibit 45) makes it a little easier to visualize the final configuration, including street trees Petitioner will be planting on Vital Way to help meet the requirements of Policy Area Mobility Review (PAMR), which will be discussed in Part II. D. of this report. The street trees also help to create a more unified “Main Street” form of development of Vital Way, which is a stated goal of the Master Plan (p. 32):

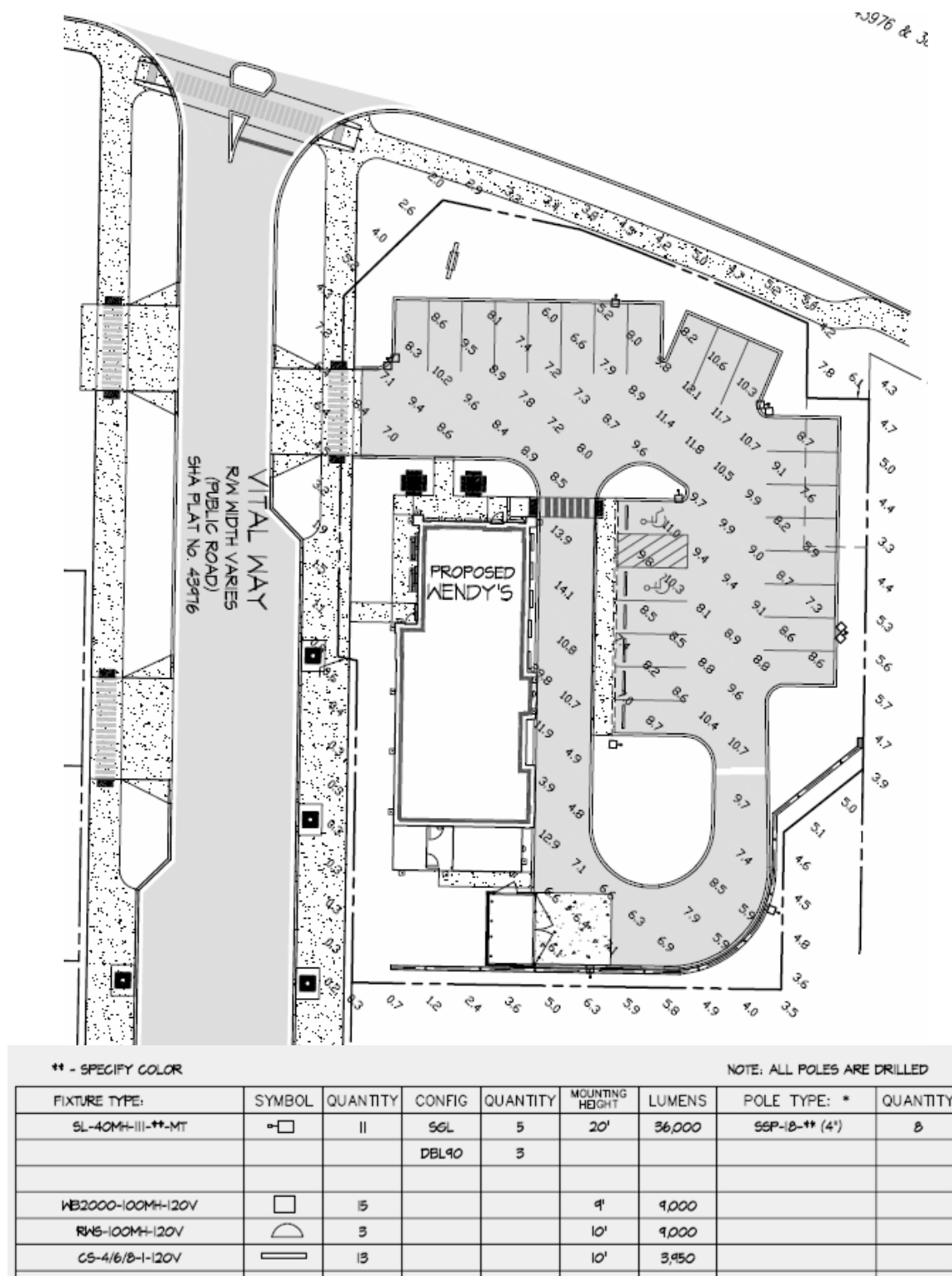


Lighting Plan and Details:

There will be decorative light fixtures placed on the split face concrete band at the head of the windows, and this band goes all the way around the building. These decorative lights shine up and shine down and wash the side of the building. Exhibit 57 shows the specifications for the strip

fluorescent lighting that will be above the fascia. This is an indirect light that splashes the fascia with light. There will be a trapezoidal light above the drive-up window, the cashier's window, and also above the rear entrance. These are down lighting flood lights that add light in those particular cases.

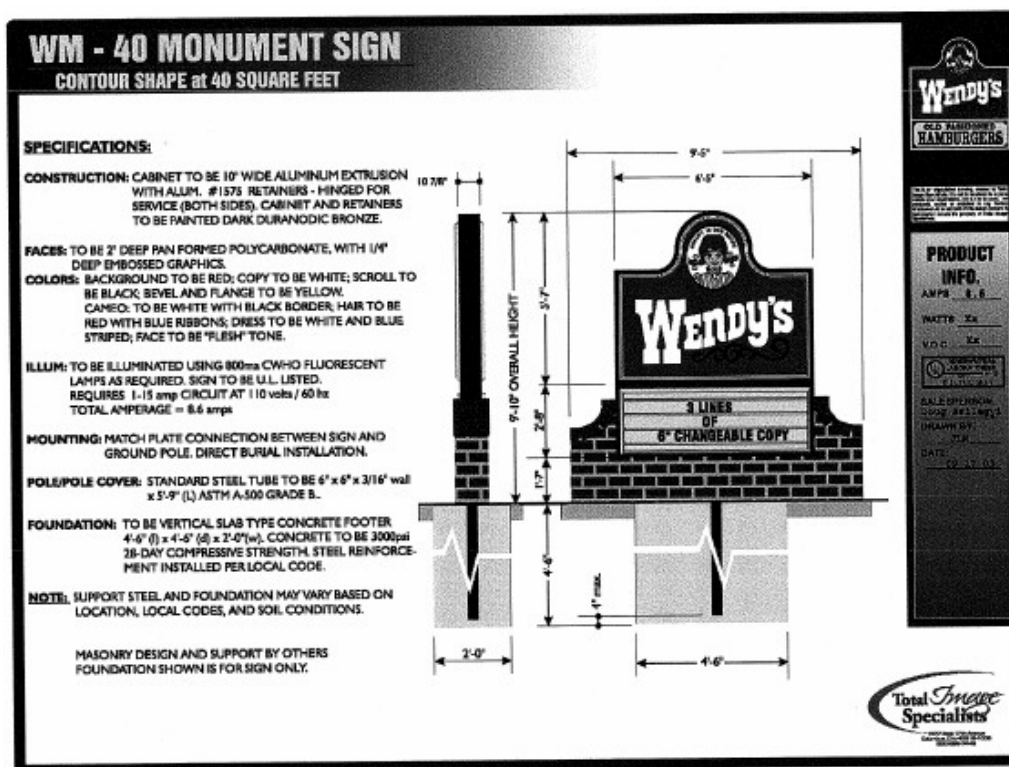
Tr. 80-82. The revised Lighting Plan (Exhibit 59(e)) is shown below:



Although lighting readings from the photometric study exceed 0.1 footcandles at the property lines, that is permissible in this commercial zone, where none of the light will infiltrate into any nearby residential zones. Tr. 84. There are no adjoining residential zones. In a commercial setting, such as this one, more light is better for pedestrian safety and for the sense of security it provides. The Hearing Examiner finds that the lighting proposed by Petitioner is appropriate to the site and will not adversely affect its surroundings.

Signage:

In addition to the signage mentioned above for the sides of the building, Petitioner proposes two “menu and order boards” and a single monument sign, as depicted in the revised Site Details (Exhibit 59(b)), and reproduced below:



A condition is recommended that Petitioner may not post the signs it proposes until it obtains a permit therefor from DPS. A copy of the permit should be filed with the Board of Appeals. Any changes to the signage details shown on Exhibits 55, 59(a) and 59(b) must be submitted to the Board of Appeals for review following Site Plan Review by the Planning Board.

The Patron Area and On-Site Parking:

The size of the patron area (917 square feet indoors and 128 square feet outdoors) is significant because it used to calculate the required parking. Zoning Ordinance §59-E-3.7 provides that a restaurant must provide 25 parking spaces for each 1,000 square feet of indoor floor space devoted to patron use, and 15 parking spaces for each 1,000 square feet of outdoor floor space devoted to patron use.

The plan initially approved by Technical Staff and the Planning Board prior to the hearing mentioned only the indoor patron area (917 square feet), and therefore Technical Staff calculated the need for 23 parking spaces (Exhibit 32, pp. 5 and 19). However, Petitioner moved some tables to an outdoor area, creating an outdoor patron area of 128 square feet, which requires two more parking spaces. The total on-site parking required therefore is 25 parking spaces, which is the number being provided by Petitioner in the final revised Site Plan (Exhibit 59(a)). That final site plan was sent to Technical Staff for review (Exhibit 59), and Staff provided no additional comments regarding parking. The Hearing Examiner therefore concludes that the amount of parking to be provided will meet statutory requirements and will be adequate for the use.

Staffing and Operations:

The hours of operation for the dining room will be from 10 a.m. to 11 p.m., seven days a week, and the drive-through will be from 10 a.m. to 2 a.m., also seven days a week. The restaurant will not be open for breakfast. A maximum of ten employees, including the manager, will be on site at one time.

Deliveries will be scheduled outside of the peak traffic hours of 6:30 to 9:30 a.m. and 4:00 to 7:00 p.m. The food and paper products are delivered twice a week. A bun delivery occurs once or twice a week, depending on the volume of the restaurant.

Trash pick-up will be made twice a week, and recycling pickups will be scheduled once a week in off-peak hours. Used cooking oil is picked up for recycling about once a week.

Mr. Hughes testified that, if the Board of Appeals approves the application, the facilities will be constructed as shown on the plans, and Petitioner will comply with any conditions that might be imposed by the Board of Appeals. Tr. 17.

C. Master Plan

The subject site is within the area of the White Oak Master Plan, as amended and approved by the District Council on February 20, 1997. Petitioner's land planner, Kevin Foster, testified that the proposed special exception will be consistent with the general plan and the applicable Master Plan for the area. Tr. 59-60.

Specific language in the White Oak Master Plan, at page 24, describes how special exceptions should be analyzed. It requires that new requests for special exception uses along major transportation corridors and in residential communities be compatible with their surroundings. Front yard parking should be avoided because of its commercial appearance, and it requires new buildings to be compatible with the character and scale of the adjoining neighborhood.

In this case, the subject project is along the major transportation corridor, but the focus of the Master Plan in the Colesville Commercial Center puts a lot of emphasis on Vital Way as being the front door to this site. So the building was proposed along Vital Way to create that architectural edge and the pedestrian space along the street, with the parking and drive-through activities internal to the site. Landscaping is used to screen the parking along Randolph Road, but the major focus was trying to create that main street feel along Vital Way.

All of the trees that are on the rendered landscape plan are newly proposed, including five of them across Vital Way from the site. These off-site trees are proposed to meet the requirements the policy area mobility review, also known as PAMR, which will be discussed on Part II. D. of this report. To meet PAMR, Petitioner is proposing to improve not only its own frontage along Vital Way, but the opposite side of the street as well. These improvements will include modifications to the street, in addition to adding trees along Vital Way.

The Master Plan states its objectives and recommendations for commercial centers on page 26. The stated objective is to “[p]rovide guidance for future improvements and development within the commercial centers to strength community identity, enhance one’s sense of place at the pedestrian scale, and best serve the needs of the community.” The Plan also recommends that commercial uses promote retail and pedestrian activity along the streets within the commercial centers; encourage civic spaces such as plazas, park areas or seating areas within shopping areas to promote social interaction and improve sense of community; provide landscape screening; reduce visual clutter from signage; provide adequate sidewalks and amenities to improve pedestrian connections; provide bus stops and shelters; and provide street trees.

In Mr. Foster’s opinion, this plan is consistent with these recommendations. Petitioner is trying to reinforce the edge along Vital Way using street furniture, an urban pedestrian streetscape, street trees, and narrowing the paving, making it safer for pedestrians along Vital Way. All of this will be consistent with the streetscape requirements in the Master Plan.

On pages 30-33, the Master Plan provides specific recommendations for the Colesville Commercial Center. As it pertains to this site, the Master Plan recommends “[r]equir[ing] properties along Vital Way in the southeast quadrant of New Hampshire Avenue and Randolph Road to develop or redevelop in a manner that provides a more unified main street form of development.” The main

street form referenced in the text (Figure 18 on page 33 of the Master Plan) suggests that buildings should be adjacent to the public sidewalk, with parking to the rear.

Mr. Foster noted that this project is consistent with that form, with the building along Vital Way, and the parking behind the building and hidden from view. That helps define the pedestrian realm. Important sidewalk connections, on-street parking and street trees were also proposed as part of this main street theme. The site has been designed with a single access point to limit possible conflicts between vehicles and pedestrians who are using Vital Way.

The Master Plan also recommends improving vehicular and pedestrian access between Colesville Shopping Center and the commercial properties along Vital Way. Vital Way, however, is currently accessed from Randolph Road by only a right-in turn and a right-out turn, with a median preventing other movements. There is thus no cross-over traffic between Vital Way and the Colesville Shopping Center. As part of this development, Petitioner will be realigning the end of Vital Way slightly. If, at sometime in the future, there is an intersectional improvement by the government, this change would help, according to Mr. Foster.

With the improvements proposed to satisfy the requirements of Policy Area Mobility Review (PAMR), Petitioner will be reducing the current four lanes of Vital Way down to two lanes of travel with parking on either side, which will enhance pedestrians access, reduce those crossing distances, and improve the streetscape and the commercial viability of this area, not just for this project, but for all the projects along Vital Way now and in the future.

Technical Staff agreed with Mr. Foster's conclusion that the proposed use would satisfy the recommendations of the White Oak Master Plan (Exhibit 32, p. 7):

Community-Based Planning staff found the proposed special exception to be consistent with the vision and recommendations for the Colesville Commercial Center set out in *the 1997 White Oak Master Plan*. Community Based Planning staff has offered the following comments:

The *Plan* recommends that properties along Vital Way in the Colesville Commercial Center “develop or redevelop in a manner that provides a more unified “Main Street” form of development (p. 32). This proposal locates the building close to Vital Way, with parking in the rear. The project is also subject to detailed site plan review, which will allow the Planning Board to review streetscape treatments that will contribute to an active, pedestrian-friendly street atmosphere.

* * *

The proposed special exception is consistent with the objectives and recommendations for commercial centers in the *Plan*. [Emphasis added.]

Urban Design staff has offered the following comments in consideration of the design guidelines of the *White Oak Master Plan*:

Vital Way is indicated as a “commercial business district street” in the White Oak Master Plan. This entails the implementation of several features:

- Installation of street trees, sidewalks, and curbs;
- Implementation of parallel parking; and
- Location of buildings and parking typical of a “main street”;

A specific section of the master plan, the “Colesville Commercial Center” (pages 30-33), describes in some detail the vision for this area. Given the large right-of-way and required public utility easement, the building is as close to the street as possible, thereby providing a comfortable pedestrian atmosphere, and provides access directly to the restaurant and outdoor seating areas for pedestrians patronizing the adjacent commercial facilities. Parallel parking is provided and excess parking is behind the building or along the side of the property facing Randolph Road. In all, the proposed development plan generally complies with all of these recommendations. [Emphasis added.]

Based on this record, the Hearing Examiner finds that the proposed use is consistent with the goals and objectives of the White Oak Master Plan.

D. Public Facilities

The adequacy of public facilities must be determined by the Planning Board at the time of subdivision review in this case.⁶ Exhibit 32, pp. 1-2. Therefore, subdivision approval must be a

⁶ “Although the property has been recorded by plat, a preliminary plan amendment is required in order to establish a new Adequate Public Facilities validity period for the project. A preliminary plan amendment has been submitted by the applicant; however, the submitted amendment cannot proceed to the Planning Board until the Special Exception has been approved by the Board of Appeals. Subdivision staff believes the layout currently proposed is acceptable.” Exhibit 32, p. 17.

condition of approval of this special exception, as has been recommended by the Hearing Examiner. Zoning Ordinance §59-G-1.21(a)(9)(A). Nevertheless, Petitioner's civil engineer, David Weber, testified that the property is served by adequate public facilities, including public water and sewer, and storm water management. Tr. 29-31. There are also gas, telephone and electric lines in both Randolph Road and Vital Way, which have adequate capacity to serve the proposed development. Given the nature of the special exception, it will have no impact on school capacity.

Petitioner's transportation planner, Mickey Cornelius, testified (Tr. 95-118; 121-123) that the proposed use will comport with both the local area transportation review (LATR) and the policy area mobility review (PAMR) requirements of Montgomery County. He analyzed the special exception in terms of its traffic impacts in a report filed as Exhibit 25(o).

The scope of the traffic study was provided by Montgomery County Park and Planning, Transportation Planning staff. That scope required an analysis of five intersections. Three intersections are along Randolph Road. The primary intersection in the area is the signalized intersection of New Hampshire Avenue, which runs north/south, and Randolph Road, which traverses east/west. Both roads are six-lane, divided, major highways. Other significant intersections are Vital Way's intersections with Randolph Road and New Hampshire Avenue, neither of which is signalized.

Because the proposed restaurant would not be open for breakfast, a morning peak-hour analysis was not required. Evening peak-hour traffic counts were conducted at the five studied intersections during the hours of 4:00 to 7:00 p.m., and existing traffic conditions were identified in terms of critical lane volume (CLV).

The subject property is located in the Fairland/White Oak policy area where the critical lane volume congestion standard is 1475. The analysis showed that four of the five intersections are currently operating with CLVs below 1475. The intersection of New Hampshire Avenue and

Randolph Road is currently operating with a CLV of 1485. It is thus five critical movements above the standard.

With the addition of background development (*i.e.*, other planned, approved developments in the pipeline), once again, four of the five intersections were projected to maintain CLVs less than 1475. The intersection of Randolph Road and New Hampshire Avenue was projected to operate with a CLV of 1490.

Mr. Cornelius then determined the number of new trips that will be generated in the p.m. peak hour by the proposed restaurant and which intersections those trips will impact. Not all of the restaurant users will be new trips because many people going to this type of facility, especially during peak hours, are motorists who are already on the road system. These are called “pass-by” trips. The Institute of Transportation Engineers has documented a pass-by rate of approximately 50 percent during peak hours for this type of facility, and that pass-by rate is accepted by Montgomery County.

Thus, in evaluating the total trips projected to be generated by the Wendy's restaurant, half of those were expected to be new to the surrounding area road system (*i.e.*, new trips), and the other half were expected to be trips that were just drawn off the surrounding roadways (*i.e.*, pass-by trips). A total of the 44 new trips will be generated in the evening peak hour, approximately 23 inbound and 21 outbound; however, only a couple of them actually impact the critical movements in the one problematic intersection, New Hampshire Avenue and Randolph Road, and those additional movements are cancelled out by the fact that some of the motorists in critical lanes will change to non-critical lanes to access the restaurant. The net result is that, although the proposed use will produce new trips, none of those trips will result in a net increase in the CLV at the intersection of New Hampshire Avenue and Randolph Road. As stated by Mr. Cornelius, “when you total up the impact of the pass-bys and the new trips, the overall impact to the critical lane volume at that intersection, New Hampshire Avenue and Randolph Road is zero.” Tr. 103-104.

The impact of the proposed use on the critical lane volume of the five studied intersections during the evening peak hour is shown in a table reproduced from the Technical Staff report (Exhibit 32, p. 10):

**INTERSECTION CAPACITY CALCULATIONS
PROPOSED WENDY'S RESTAURANT, COLESVILLE**

Intersection	Traffic Conditions					
	Existing		Background		Total	
	AM	PM	AM	PM	AM	PM
Randolph Rd/Locksley Ln	--	913	--	915	--	918
Randolph Rd/Vital Way/Shop Ctr Dr	--	834	--	844	--	886
New Hampshire Ave/Randolph Rd	--	1,485	--	1,490	--	1,490
New Hampshire Ave/Vital Way	--	892	--	900	--	911
New Hampshire Ave/Wolf Dr	--	1,315	--	1,316	--	1,319

Source: The Traffic Group, Inc. Wendy's Colesville, Traffic Impact Analysis; December 9, 2008.

Note: Fairland/White Oak Policy Area Congestion Standard: 1,475 CLV

As shown in this Table, under "Total" traffic conditions (*i.e.*, including the impact of the proposed Wendy's), CLV values for intersections included in the study are either below the Fairland/White Oak Policy Area congestion standard (1,475 CLV) or maintain the CLV determined under Background traffic conditions. Under the LATR standards, even though one intersection will continue to exceed the critical lane volume standard for the area, this proposal still passes LATR because the total impact will not add any critical lane volume to that offending intersection. Technical Staff therefore found that the proposed use satisfies the LATR requirements of the adequate public facilities (APF) test. Exhibit 32, pp. 10-11.

Even though LATR is satisfied, Petitioner still has to comply with the PAMR component of the APF test. As stated by Technical Staff (Exhibit 32, p. 11), a development within the Fairland/White Oak Policy Area is required to mitigate 45% of "new" peak-hour trips generated by the use. Based on a total of 44 "new" peak-hour trips that will be generated by the proposed Wendy's, the mitigation requirement for the proposed use will be 20 peak-hour trips (44 "new" peak-

hour trips X 45% = 20 peak-hour trips). Technical Staff reports that, as PAMR mitigation, the Petitioner is proposing full reconstruction of approximately 300 linear feet of Vital Way to the south of Randolph Road along site frontage, per *White Oak Master Plan* recommendations and DOT roadway standards.

These improvements would include reconstructing the existing road, bringing out the curb line with on-street parking and then bumping out the curb line. There is an existing four-foot sidewalk for a portion of the east side of Vital Way. Petitioner would take that sidewalk out and replace it with an eight-foot wide sidewalk with street trees, and also do the same thing on the other side. There is no sidewalk that currently exists there. Handicap pedestrian ramps will be provided at the intersection of Vital Way and Randolph Road. There will be Handicap ramps at the reconstructed access drives, as required, and a pedestrian refuge island. Tr. 106-107.

Petitioner has coordinated this improvement with Transportation Planning, DOT, and DPS staff, and has concurrence from Staff on counting the Vital Way improvement toward Applicant's PAMR trip mitigation requirement. Staff therefore concluded that the proposed use will satisfy the PAMR requirements of the APF test.⁷ Exhibit 32, p. 11.

Mr. Cornelius also testified that the proposed site has been designed for the maximum safety of vehicular and pedestrian traffic. Tr. 111-112. The site has been designed with a single access on Vital Way, which is 22 feet in width. Typically you would find two access points to this type of facility. So in that respect, Petitioner has narrowed the pedestrian-vehicular conflicts to a single 22-foot wide access point, which is consistent with the Master Plan for this area. Sidewalks are being constructed on both sides of Vital Way, and reconstructed along sections of Randolph Road.

⁷ The Transportation Staff also recommended a number of conditions which pertain to subdivision and site plan review (Exhibit 32, pp. 11-12). They are not recommended conditions by Technical Staff for this Special Exception. Those recommended conditions appear on pages 1-2 of the Technical Staff report (Exhibit 32) and have been incorporated into the Hearing Examiner's recommended conditions.

In sum, pedestrian circulation and pedestrian safety are being improved adjacent to the subject property. As one exits the subject property, there is very little traffic that proceeds northbound, so that movement is relatively unimpeded, and there is not much vehicular conflict at that location. Overall, with the single access drive, the circulation pattern as proposed, and the PAMR improvements that are being provided, it is Mr. Cornelius's opinion that there is a net benefit to pedestrian safety in this area.

As to vehicular safety, any time you add a new access point, you add a point of interaction. But in this case, Petitioner has kept it to one location at a safe place to enter and exit the road. Mr. Cornelius testified that it has been designed to achieve maximum safety, and in his opinion, internal vehicle and pedestrian circulation, as well as points of external access, will be safe, adequate and efficient.

Mr. Cornelius also opined that the special exception will be in harmony with the general character of the surrounding area, considering traffic and parking conditions, and it will not create any traffic hazard or nuisance because of its location or relation to similar uses. This proposal will not have any adverse effects on transportation facilities, and there are adequate transportation facilities to serve this project. Moreover, it will not create any queuing on Vital Way of cars waiting to be served. The circulation route through the parking lot allows a person who enters from Vital Way to proceed into the lot, traverse along the east side, traveling southbound on the back of the lot, and then circle back around the building. He indicated that a dozen cars could probably be stacked within the site and not impact Vital Way.

The Hearing Examiner raised a concern at the hearing about internal circulation, in that there was no sign to tell an entering motorist not to turn right immediately, thus allowing wrong way traffic in the queue line. Petitioner agreed to revise the plans and did so after the hearing by filing a revised site plan (Exhibit 59(a)), with a "no right turn" sign strategically placed.

E. Environment

The site is within the Northwest Branch watershed. According to Petitioner's land use report (Exhibit 25(k), pp. 9-10), there are no existing 100-year floodplains, forests, or historic sites associated with the site; nor are there any rare, threatened, or endangered species known on the site. Since the site was previously developed, there is no area that qualifies as forest. An updated Natural Resources Inventory and Forest Stand Delineation (NRI/FSD) was approved on August 6, 2008 (NRI/FSD# 42009025E), and a Forest Conservation Exemption was also approved (FC Exemption No. 42009025E). Street trees and landscape trees are proposed which will provide shade to paved areas and reduce the urban heat island effect and the thermal impact of runoff from such areas.

Technical Staff discusses environmental issues on pages 12 and 13 of its report (Exhibit 32). Staff confirmed that there is no forest on site, and this property is exempt from submitting a Forest Conservation Plan. Exhibit 7(a).⁸ A Tree Save Plan was not required to be submitted, as there are no large or specimen trees present. The site does not include any streams, wetlands, or floodplains, and there is no environmental buffer on the property. Staff also noted that this project will not need to comply with County Council Bill 17-06, Montgomery County Green Buildings Law, because the size of the building is less than 10,000 square feet.

A stormwater management concept was approved by the Department of Permitting Services on December 1, 2008 (Exhibit 25(i)). The stormwater management concept consists of on-site water quality control and on-site recharge via construction of three bio-filters, with additional storage beneath the under-drain pipes and one infiltration trench. Channel protection volume (*i.e.*, quantity control) is not required because the discharge is below threshold values (*i.e.*, less than or equal to 2.0

⁸ Because Petitioner was granted an exemption from compliance with the forest conservation regulations by Environmental Planning Division of Technical Staff, the Preliminary Forest Conservation Plans prepared by Petitioner's engineer, Mr. Weber, are moot. Thus, Exhibits 7(b) and (c) (*i.e.*, (b) being the Plan and (c) being the Details), are not in effect at this point. Tr. 33-35.

cubic feet per second).

Given this evidence, the Hearing Examiner finds that there are no environmental issues warranting denial of this petition.

F. County Need

Since the Zoning Ordinance requires a showing of “County need,” to qualify for a “drive-in restaurant” special exception, Petitioner produced a market analysis by Thomas Flynn, an expert in the field. In his opinion, a need exists for the proposed use due to an insufficient number of similar uses presently serving the neighborhood and the county as a whole, and the proposed use will not result in saturation of similar uses in the general neighborhood. Tr. 85-95. His testimony is also summarized in the Executive Summary at the beginning of his “Need Study” (Exhibit 14).

Mr. Flynn delineated the market area as the area within a four minute drive of the site. That area corresponds essentially with the Colesville community. He then reviewed all of the potentially competitive dining establishments, fast food and convenience food, in the area. There are 12 of them, and he visited each one.

Mr. Flynn also conducted an intercept survey, and interviewed approximately 31 people who were in the area. Some of them were residents; some were people traveling through the area; and others were people shopping in the area. He asked them whether they felt that there was a need for a restaurant at the subject site. A majority of the people felt that there was a need for more options in terms of dining.

Mr. Flynn then obtained an estimate of actual retail sales and need, and potential need for more sales by specific areas within the defined market area, from a company called “Claritas,” which is an international company that specializes in providing data on retail sales. On that basis, he identified a retail gap of over \$6 million in sales for this type of establishment. That clearly indicated

to him that there was a market basis and a need in the community for the type of establishment that was being contemplated here.

Mr. Flynn also looked at the county as a whole, and based on the figures available, estimated a need or gap of about \$220 million in sales for establishments of this type. Based on these calculations, he concluded that there was a need county-wide, as well as within the general neighborhood. In Mr. Flynn's opinion, a need exists for the proposed use due to an insufficient number of similar uses presently serving existing population concentrations in the county. The proposed drive-in restaurant use will not result in a multiplicity or saturation of similar uses in the neighborhood of the site.

Although Research and Technology Technical Staff reviewed and approved Mr. Flynn's conclusion, they questioned some of his analysis. Technical Staff expressed the view that he had considered only the residents of this four minute drive area, and had failed to take into account people who work in the area and people who are traveling through. According to Mr. Flynn, the figures that he used did take all three of those sources into account – the resident population, people who work in the area and people on the roads. He stated that vehicle traffic is very significant. Had he not considered it, his estimates of demand would actually be greatly understating the need that does exist.

The Hearing Examiner questioned Mr. Flynn about Technical Staff's statement in their report (Exhibit 32, p. 23) that Mr. Flynn did not account for menu or food concept differences among the applicant's sample, square footage of each establishment, estimated annual sales and distance from the proposed subject site. Mr. Flynn responded that page 3-1 of his Need Study showed the locations of all of the establishments; pages 3-1 and 3-2, showed the types of establishments, their addresses, whether they serve alcohol and whether there is drive-through; and on page 3-3, there is a discussion of the competitive ones; the type of service; the type of food that they provide; in what ways they are competitive; and the total sales associated with these establishments. He did not feel that the square

footage of each of those establishments was particularly relevant in this case. The Hearing Examiner finds that Mr. Flynn appropriately addressed Technical Staff's concerns. Apparently so did Technical Staff, because they concluded, "At a minimum, applicant's analysis is sufficient." Ex. 32, p. 20-23.⁹

There is no evidence to the contrary, and the Hearing Examiner therefore finds that a need exists for the proposed use due to an insufficient number of similar uses presently serving existing population concentrations in the County, and the use at the location proposed will not result in a multiplicity or saturation of similar uses in the same general neighborhood.

G. Community Response.

There have been six letters expressing concerns of the community, but no opposition appeared at the hearing. The letters (Exhibits 22, 30, 60, 61, 66 and 68), four of which are from the Greater Colesville Citizen's Association (GCCA) and two of which are from Barbara Foresti, a resident of White Oak,¹⁰ centered mostly on vehicular and pedestrian safety problems.

Since some of the suggestions for additional improvements to the site and surroundings raised in GCCA's first letter (Exhibit 22) appear to have been addressed prior to the hearing, they will not be further discussed here. GCCA's second letter (Exhibit 30) indicates that "the proposed Wendy's visual impact on the neighborhood has been improved," but "safe street crossing movements by pedestrians has not been adequately addressed." GCCA makes two suggestions – that a traffic signal and crosswalk be established at the intersection of Vital Way and Randolph Road and that a painted or raised pedestrian crossing at midpoint of Vital Way be included in the streetscape improvements.

In order to carry out GCCA's suggestions, the Montgomery County Department of Transportation (DOT) would have to agree to do so. Although transportation and safety issues will

⁹ It should be noted that the case law defines "need" in the Zoning Ordinance, not as that which is absolutely necessary, but rather as that which is "expedient, reasonably convenient and useful to the public." *Lucky Stores, Inc. v. Board of Appeals of Montgomery County*, 270 Md. 513, 527-28, 312 A.2d 758 (1973).

¹⁰ Ms. Foresti does not appear to be representing any organization, but she indicated in her second letter (Exhibit 66) that she is the "Former Chair of the White Oak Master Plan CAC" (*i.e.*, Citizens Advisory Committee).

be the subject of subdivision, it appears that DOT agreement is unlikely. In a letter, dated February 6, 2009, from Gregory Leck, Manager of DOT's Development Review Team, to Mr. McCluskey of GCCA (Exhibit 49), Mr. Leck responded to each of the points that had been raised by GCCA.

Mr. Leck states the angle of the existing shopping center drive at Randolph Road is not conducive to creating a full movement intersection through a simple realignment of Vital Way. To implement such movements, the shopping center on the other side of Randolph Road would need to relocate and realign its driveway. Secondly, installation of a traffic signal at the intersection of Randolph Road and Vital Way is not appropriate until the shopping center entrance is modified as discussed above. Thirdly, as part of the project, the applicant is proposing to reconstruct approximately 300 feet of Vital Way south of the intersection with Randolph Road. These improvements will result in narrowing pedestrian crossing distances and creating pocket parking areas. DOT is not proposing installation of a raised nor marked crosswalk on Vital Way by this applicant. DOT will monitor Vital Way to determine the need for additional pedestrian crossing signs and/or a marked crosswalk if there is sufficient pedestrian activity on that roadway.

Given DOT's position and the fact that transportation facilities will be reviewed by the Planning Board at subdivision, it would be appropriate to leave these details to be discussed at that time. Suffice it to say, at this juncture, all the expert evidence on transportation matters (from Transportation Planning Staff, from DOT and from Petitioner's expert) supports the conclusion that the present design for the use will be safe and efficient for vehicular and pedestrian traffic. The Hearing Examiner cannot elevate the expression of community concerns above the weight of the uncontradicted expert evidence. *Rockville Fuel v. Board of Appeals*, 257 Md. 183, 192, 262 A.2d 499, 504 (1970).

One final transportation-related issue falls into the same category. After the hearing, GCCA sent a letter, dated February 22, 2009 (Exhibit 60), suggesting that the access to the site should be

located further away from Randolph Road than planned. The same point was raised in a post-hearing letter dated February 21, 2009, from Barbara Foresti (Exhibit 61). Ms. Foresti also questioned the wisdom of the planned on-site circulation system. On March 10, 2009, the Hearing Examiner reopened the record to explore the suggestion made in these post-hearing comments that the single access to the site should be moved to the south end of the proposed building (Exhibit 62). Responses were received from the Montgomery County Department of Transportation (Exhibit 63), Technical Staff (Exhibit 64), Petitioner (Exhibits 65 and 67), Ms. Foresti (Exhibit 66), and GCCA (Exhibit 68).

The response from GCCA (Exhibit 68) reports that “all the citizens [at a community meeting] voiced opposition for the entrance being on the north side of the restaurant near Randolph Road.” They believe it is a safety issue because the large number of cars turning into Vital Way from Randolph Road may run into cars paused to turn into the new Wendy’s driveway (located only 75 feet from the intersection), thereby resulting in an accident. GCCA then suggested another internal circulation configuration for the site, while noting that it was not preferred by Technical Staff. It appears from Ms. Foresti’s letter (Exhibit 66) that Technical Staff disapproved other site configurations because they would be inconsistent with the Master Plan. Ms. Foresti argues that safety is more important than the Master Plan.

The problem once again is that all the transportation experts offering evidence in this case disagree with GCCA’s and Ms. Foresti’s conclusion that the present plan would be unsafe.

Mr. Leck of DOT responded (Ex. 63) that while DOT prefers driveways to be 100 feet from the intersection [and this driveway access would be only 75 feet from Randolph Road],¹¹ this criterion is a general guideline, subject to variation based on special circumstances and engineering judgment. DOT did not prefer an alternate site access plan with a southern entrance, and Mr. Leck concluded:

¹¹ The distance between the site’s single access driveway and the intersection of Randolph Road and Vital Way is about 75 feet (Tr. 24), but that is not to be confused with the related measure of sight distance, which is 93.5 feet from the midline of the driveway to the midline of Randolph Road (Exhibit 59(f)). Tr. 49-51.

. . . We believe the plan currently submitted by the applicant best balances the aforementioned goals. The proposed layout maximizes the room for queuing on-site vehicles and reduces the potential for them to impact the public right-of-way. Although the proposed entrance location is closer than our desired spacing from an intersection, it is reasonable to expect the low traffic volumes projected for the site and along Vital Way will not result in unacceptable traffic operations.

Technical Staff also filed a supplemental report on the access/circulation issue (Exhibit 64).

Staff concluded:

The north access driveway from Vital Way [*i.e.*, the access proposed by Petitioner] is acceptable to DOT, eliminates any potential stacking problem from Vital Way, and provides for an overall better site design.

The driveway access and internal circulation depicted on the plan that was presented to the Planning Board and received the Board's recommendation for approval is the most feasible alternative.

The Hearing Examiner has given the community the opportunity to air its concerns and to make suggestions; he has also asked for and received responses to their concerns from both DOT and Technical Staff. All of the expert evidence, including the advice from two neutral government agencies, DOT and M-NCPPC, supports the access/circulation plan presented by Petitioner (*i.e.*, the single access at the northern end of the site) as the best one for this site. While GCCA and Ms. Foresti have raised some legitimate concerns about traffic safety, the Hearing Examiner concludes, based on a preponderance of the evidence, that the site access and circulation proposed for the site are safe for both pedestrian and vehicular traffic. Of course, site access and circulation will be reviewed again in more detail at subdivision and site plan, and the community should make its concerns known at that time.

III. SUMMARY OF THE HEARING

Six witnesses testified at the hearing, Thomas Hughes, DavCo's Vice-President of Construction; David Weber, Civil Engineer; Kevin Foster, Land Planner; Robert Saunders, Architect Thomas J. Flynn, Market Analyst; and Mickey Cornelius, Traffic Engineer. The People's Counsel,

Martin Klauber, Esquire, participated, but did not call any witnesses. There were no opposition witnesses.

At the beginning of the hearing, Petitioner's counsel indicated that they had added two parking spaces to the site plan because they had moved some tables to an area that might be considered outdoor seating, leading to the need for two more parking spaces. It was agreed that the record would be held open for at least 10 days to allow for comment by Technical Staff and interested parties. Tr. 7-10. At the end of the hearing, Petitioner's counsel agreed, at the suggestion of the Hearing Examiner, that the plans would also be modified to add appropriate pavement markings and a stop sign to make site circulation more clear. Tr. 122-123.

1. Thomas Hughes (Tr. 12-17):

Thomas Hughes testified that he is DavCo's Vice-President of Construction. Davco Restaurants is a franchise of Wendy's International operating 158 Wendy's restaurants in the Baltimore, Northern Virginia and D.C. area. Mr. Hughes has processed other Wendy's in this area, the most recent one being at Wheaton Plaza.

The restaurant building that is proposed in connection with this application is a standard prototype building that is used by Wendy's elsewhere in Montgomery County. The hours of operation for the dining room will be from 10 a.m. to 11 p.m., seven days a week, and the drive-through will be from 10 a.m. to 2 a.m., also seven days a week. The restaurant will not be open for breakfast. A maximum of ten employees, including the manager, will be on site at one time.

Deliveries will be scheduled outside of the peak traffic hours of 6:30 to 9:30 a.m. and 4:00 to 7:00 p.m. The commissary, which is basically all the food and paper products, is delivered twice a week. And then there is a bun delivery which is once to twice a week, and it depends on the volume of the restaurant.

Trash pick-up will be made twice a week and once a week for the recycling, and they will be scheduled in off-peak hours. Used cooking oil is picked up for recycling about once a week.

Mr. Hughes testified that, if the Board of Appeals approves the application, the facilities will be constructed as shown on the plans, and Petitioner will comply with any conditions that might be imposed by the Board of Appeals. Tr. 17.

2. David Weber (Tr. 17-41; 49-51; 73-75; 83-84; 118-121)

David Weber testified as an expert in civil engineering. He described the site conditions. The property gently slopes from the high point along Randolph Road to the south. The property is bounded on the north by Randolph Road, the west by Vital Way, the south by an existing commercial development that currently is an Asian food restaurant, and on the east by another commercial development that is currently a liquor store.

Up until approximately one month ago, the property had a structure on it in the northwest corner. Originally it was constructed as a dwelling but had been used primarily in recent times as a commercial building with a shed or garage approximately in the middle of the property. Those structures have been removed. About a month before the hearing, the Department of Housing and Community Affairs (DHCA) cited the property for the dangerous conditions of the structures on site, and issued a condemnation notice (Exhibits 40 and 41). The owner then obtained a demolition permit (Exhibit 42) and removed all the structures from the site. DHCA thereafter released the condemnation notice (Exhibit 43).

Using a rendered revised landscape plan (Exhibit 45) Mr. Weber showed where two new parking spaces had been added along the northeast property line. There are now eight spaces there instead of six. The two spaces are at the end of the row in the southerly portion. No tree removal was required to do so.

Mr. Weber then introduced the rendered revised site plan (Exhibit 46). In compliance with

the master plan and the desire to create a streetscape, the building itself is oriented parallel and as close to Vital Way as possible. There is a 10 foot setback from the right of way line, which is for the public utility easement. There is one point of access from Vital Way, approximately 75 feet from the intersection of Vital Way and Randolph Road. It provides both ingress and egress.

As to circulation, cars will enter the site through this point of access, travel in a northeast direction, make a 90 degree turn, travel in a southeast direction to the southern most portion of the site, make two right hand turns traveling past the two menu board and order boards which are at the most southeasterly portion of the property. Two payment and pick-up windows are on the northeast side of the building. They then exit the site by traveling to the northwest turning left and back out the same entrance.

Parking is established around the perimeter of the site on the northwest/northeast sides, and across the main driveway, there are additional spaces, including two handicapped spaces. Mr. Weber noted that the C-1 zone has specific requirements for height, lot coverage, green space.

Montgomery County's requirements for parking for eating and drinking establishments provide, in §59-E-3.7, that 25 spaces are needed per one thousand square feet of indoor patron area. The proposal calls for 917 square feet of interior patron area at the northwest portion of the building, and that requires 23 spaces. The two tables that were described earlier are located outside, to the northwest of the building. Originally, they were to be located to the southwest of the building, but that area is a public utility easement. Petitioner therefore moved them to the northwest side of the building, ostensibly as part of the streetscape, but because they are not directly adjoining the street, it was conceivable that somebody could consider these two tables as exterior patron area. To be sure that they did not run into any objections at a later time, Petitioner modified its plan. These two tables take up approximately 128 square feet. The parking requirement in the code for exterior patron area is 15 spaces per 1,000 square feet, which requires two additional spaces. So the 23 plus the 2 is a

total of 25 spaces, and with the spaces around the perimeter and approximately the middle interior of the site, there are 25 spaces on site. A revised site plan showing the additional parking was introduced.

According to Mr. Weber, the development standards of the C-1 zone applicable to this property calls for a 10 foot minimum building setback. Along Vital Way there is a 10 foot setback. Along Randolph Road there is approximately a 73 foot setback. There are no side or rear setbacks called for in the C-1 zone. There is a requirement for a maximum building height of 30 feet in the C-1 zone. The proposed building is less than that at approximately 20 feet in height. The green area requirement in the C-1 zone is a minimum of 10 percent. After adding the two parking spaces, there will be approximately 19 percent green area. The internal landscape parking lot requirement, which is part of the overall green space requirement, is five percent, and the site complies, with five percent provided.

In Vital Way, there are existing water and sewer services that are under maintained by WSSC. Petitioner will be making service connections to those existing pipes. It will have no adverse impact to the public water and sewer lines. Approximately 800 feet south of the property is the fire and rescue station. Approximately 1,000 feet south of the property is the police substation. There are also gas, telephone and electric lines in both Randolph Road and Vital Way. They have adequate capacity to serve the proposed development. Also, there will not be a negative impact.

Storm water management for this property is considered by the Department of Permitting Services, Water Resources Section, to be a redeveloping property. Therefore, Petitioner is not required to provide any quantity controls for this development, only quality controls. Petitioner has an approved storm water management concept plan, which provides three bio filtration facilities on site that will act to filter and improve the quality of the storm water run off. One facility is in the northwest corner of the property off the edge of the parking lot. The second facility is in the northeast corner of the property off the edge or the parking lot. The third bio filtration facility is in

the largest green space island, approximately the middle of the property. Southeast of the building, Petitioner will be providing a fourth facility, which will be an infiltration trench. With all four of the facilities, the site exceeds the requirements of DPS. The technical plans will be revised as part of the construction document package at permitting. The change to the storm water manager concept that is required to accommodate the two additional parking spaces, will not require a change in the storm water management concept as Petitioner goes through the subdivision process.

Because of the size of the property and the fact that there is no forest cover, Petitioner was granted an exemption from compliance with the forest conservation regulations by the Maryland National Capital Park and Planning Commission, Environmental Planning Division, even though Mr. Weber had prepared Preliminary Forest Conservation Plans. Thus, Exhibit 7(b) and (c), (b) being the Plan and (c) being the Details, are not in effect at this point. Tr. 33-35.

As to signage, Mr. Weber noted that the two menu and order boards are off the edge of the parking lot in the southeast corner of the property. The one identification sign is in the northwest corner of the property, again, off the edge of the parking lot.

Mr. Weber opined that the proposed special exception will not cause any objectionable noise, vibrations, fumes, odors, dust, illumination, glare or physical activity from a civil engineering standpoint. Any of those characteristics that might be generated by this restaurant would be inherent to a drive-in restaurant use. The proposed use will be served by adequate public facilities. From a civil engineering standpoint, the proposed development will not reduce the safety of vehicular or pedestrian traffic. It will improve the safety by the addition of public sidewalks, and the use of a single driveway access point. He used the turning templates and the AutoCAD software to ensure that passenger vehicles, pickup trucks and delivery vehicles can safely drive through the site.

Mr. Weber also opined that the special exception will not result in a nuisance because of noise, illumination, fumes, odors or physical activity. The site is completely surrounded by other

commercial uses, and the lighting fixtures that are proposed are the cut off shoe box type fixtures that direct the light downward rather than out. And many of the fixtures actually have recessed lighting. Moreover, the special exception will not preempt frontage on any highway or public road so as to substantially reduce visibility or accessibility of an interior commercial area which is oriented to the same highway or public road. That's primarily due to the fact that the building, as described earlier, will be set back approximately 73 feet from Randolph Road, and that all the other commercial uses already have their own existing commercial driveway access points.

In Mr. Weber's opinion, the special exception will not generate product displays, parked vehicles or other obstructions which adversely affect visibility at intersections or at entrances and exits to and from the site, mostly because of the placement of the building and the parking setback primarily from Randolph Road. The ingress/egress driveway is located at least 20 feet from the intersection of the front and side street lines of this property. It's set back approximately 75 feet from Randolph Road, and the driveway width is 22 feet, so it does not exceed 25 feet.

[Petitioner's counsel introduced a letter dated February 6, 2009, from Gregory Leck, who is with Montgomery County Department of Transportation, to Mr. McCluskey of the Greater Colesville Civic Association (Exhibit 49). It is a response to a letter referenced to, from the Greater Colesville Civic Association dated December 17, 2008, and Mr. Leck responds to the three points raised in that letter. Number one, Mr. Leck states the angle of the existing shopping center drive at Randolph Road is not conducive to creating a full movement intersection through a simple realignment of Vital Way. To implement such movements, the shopping center would need to be a participant to relocate and realign their driveway as well. This is the shopping center on the other side of Randolph Road.

Number two, installation of a traffic signal at the intersection of Randolph Road and Vital Way is not appropriate until the shopping center entrance is modified as discussed above. Number three, as part of the project, the applicant is proposing to reconstruct approximately 300 feet of Vital

Way south of the intersection with Randolph Road. These improvements will result in narrowing pedestrian crossing distances and creating pocket parking areas. DOT is not proposing installation of a raised nor marked crosswalk on Vital Way by this applicant. DOT will monitor Vital Way to determine the need for additional pedestrian crossing signs and/or marked crosswalk if there is sufficient pedestrian activity on that roadway.

According to Mr. Weber, the Department of Transportation has no official published requirements for how far away from the intersection an access point is. There is a desire to get 100 feet between the ending of the curve and the beginning of the access point. He added that, in his discussions with DPS and DOT, with the configuration of such a large radius in the area of the intersection of Vital Way with Randolph Road, they found that Petitioner's configuration for that separation (75 feet from Randolph Road to the driveway access point) is acceptable. Tr. 39-40. At either subdivision or permitting, Petitioner will receive some type of official approval from DOT stating that that setback from the access point is satisfactory.

A separate measurement is made of sight distance to the center of the intersection (Exhibit 25(j)), and it is 93.5 feet, but because there is an intervening intersection, there is no sight-distance requirement. The sight-distance standards come from the American Association of State Highway and Transportation Officials (AASHTO). This is distinguished from the DOT desire for a 100 foot distance from the driveway to the curb line of the intersection. They are two different measurements. Tr. 49-51.

Mr. Weber further testified that the revised lighting plan (Exhibit 54) accurately shows two additional parking spaces. The revised elevations (Exhibit 55) show the two drive-thru windows. The light levels, in foot candles, around the perimeter property lines vary from approximately a low of one half of a foot candle to a high of about six and a half foot candles. It averages out to be about 3 1/2 foot candles around the entire perimeter. The 6 1/2 foot candles are located on the perimeter

along the back of the liquor store to a blank wall. The northeasterly property line, has the highest foot candle level. There are no surrounding residences that abut the subject property. The site is completely surrounded by commercially zoned properties or public streets, and across the public streets are also commercially zoned properties.

Mr. Weber described how traffic would be guided around the site into the lane that goes by the two service windows. In the center of the property, there is a bay of parking that is surrounded by concrete curb and gutter, which creates an island that will guide traffic. Cars enter the site and travel in a clockwise motion through the site, placing the order at the order board at the southern edge of the property, traveling through the drive-through windows and then exiting the property. There are two handicap accessible parking spaces at the north end of this parking bay which are protected by curb and gutter, and there is a ramp or depressed curb that allows the patrons that are occupying the handicap accessible spaces to cross the drive-thru and enter the building. There is no other way that traffic can get into the queue, to give orders and pick up food, but go along that directed pattern just described.

The Hearing examiner raised a concern that there was no sign that tells people, when they come in at the entry point, not to make a right. And second, there is a cross-walk there. So you have the vehicles coming out and going over the cross-walk, then they cross the incoming cars as well, possibly creating a dangerous situation. As to the pedestrians crossing, Mr. Weber testified that, with the payment and pick up windows set to the southern end, it allows for temporary stacking of vehicles in the drive-thru lane, to allow patrons using the cross-walk to be able to cross. It is a clear line of sight for the patron leaving the food pick up window exiting the site. He therefore is not at all concerned about safety.

3. Kevin Foster (Tr. 42-71):

Kevin Foster testified as an expert in land use planning. He introduced a Special Exception

Surrounding Area Plan (Exhibit 50), an aerial photo with an outline in purple showing the area that both he and Park and Planning staff agreed was the surrounding area (*i.e.*, general neighborhood) for analyzing the special exception.

Using a zoning map (Exhibit 52), Mr. Foster noted the subject property at the intersection of Vital Way and Randolph Road. The dark hatched area on the exhibit represents the C-1 zoned areas of the Colesville Commercial Center. To the west of the subject property and the Colesville Commercial Center, is the Morningside townhouse, single-family development, which is PD-7. Also in the PD-7 zone, all the way to the north, is a continuation of the Morningside subdivision, with townhouses wrapping around the backside of the commercial district, and there's the Park and Ride lot. The single family homes along Bregman and Wolf Drive to the southwest of the subject property are zoned R-200.

Mr. Foster determined that the area most affected by the special exception would be the Colesville Commercial Center, which is basically the four corners of the intersection of Randolph Road and New Hampshire Avenue. It includes the Giant Food Shopping Center on the northwest, miscellaneous retail on the northeast corner of Randolph and New Hampshire, a McDonald's and medical offices. On the southeast corner of Randolph and New Hampshire, there are multiple two and three story office buildings, a CVS, several banks, and the Post Office. The center core or the southeast quadrant of that intersection contain a bank, Pizza Hut, a cleaners, a Chinese Restaurant and the subject property, which is now vacant. That area of influence also includes parts of the Morningside town house and single-family subdivision to the north of Randolph Road and west of the Colesville Shopping Center. The single family detached homes that are bounded by Bregman Road and Wolf Drive to the south of the subject property may also be affected. Randolph Road and New Hampshire Avenue are both six lane arterials.

Mr. Foster testified that adding the two parking spaces has not changed the analysis, findings and conclusions in his land use report, Exhibit 25(k). He introduced the revised landscape plan (Exhibit 51).

He indicated that there are seven criteria used to identify the physical and operational characteristics of a use. Those criteria are size, scale, scope, lighting, noise, traffic, and the environment. The inherent physical and operational characteristics associated with a drive-in restaurant, are the building itself that houses the restaurant; the parking facilities and parking lot that serve the facility; the lighting for the parking lot and the building; the noise generated by vehicles using the facility and using the drive-thru; vehicle trips to and from the site by employees of the restaurant and the patrons; and then the hours of operation. These have been recognized by the Board of Appeals or the hearing examiner as inherent characteristics in other drive-in restaurant cases.

Mr. Foster stated that there are some non-inherent characteristics to the site, but they are not adverse characteristics. Rather, they are all positive. In this case, the building is placed along Vital Way to create a pedestrian activity zone along Vital Way and create an architectural edge. The site access is limited to one access point, where typical drive-thru restaurants usually have multiple access points, so that limits interaction between vehicles and pedestrians. All of the parking activity is behind the building and the focus is on that pedestrian main street that's being created a long Vital Way. This was designed in this fashion to comply with the language in the Master Plan.

In Mr. Foster's opinion, neither the physical nor the operational characteristics of this use will result in any adverse impacts because the modest size and scale of the proposed building and the parking facilities can easily be accommodated on the site.

He testified that the proposed one-story building and minimum 25 parking spaces are compatible with the surrounding retail and restaurant character of the area. The scope of the proposed operation is typical for a drive-thru restaurant, and in his opinion, will have little or no impact on the

surrounding commercial businesses. The lighting for the site will be compatible with the surrounding uses. The light types for the parking lot are cut off type fixtures. They will not be generating any glare or nuisance. Although there will be moderate light levels at the edge of the property, all of the surrounding properties are commercial uses themselves, and there are no adjoining residential uses. There will be no adverse noise or traffic impacts to the subject property. The proposed layout has reduced the number of vehicle access points, and has located the vehicular activities to the internal portions of the site.

In Mr. Foster's opinion, the proposed special exception will be consistent with the general plan and the applicable master plan for the area. Specific language in the White Oak Master Plan describes how special exceptions should be analyzed (on page 24). It requires new requests for special exception uses along major transportation corridors and in residential communities to be compatible with their surroundings. Front yard parking should be avoided because of its commercial appearance, and it requires new buildings to be compatible with the character and scale of the adjoining neighborhood.

In this case, the subject project is along the major transportation corridor, but the focus of the Master Plan in the Colesville Commercial Center puts a lot of emphasis on Vital Way as being the front door to this site. So the building was proposed along Vital Way to create that architectural edge and the pedestrian space along the street, with the parking and drive-thru activities along Randolph and internal to the site. Landscaping is used to screen the parking along Randolph Road, but the major focus was trying to create that main street feel and not the typical commercial front door that you get along Vital Way.

All of the trees that are on the rendered landscape plan are newly proposed, including five of them across Vital Way from the site. Part of the requirements of the site are for PAMR, the policy area mobility review. To meet PAMR, Petitioner is going to be improving not only its frontage along

Vital Way, but the opposite side of the street as well. That's why the street improvements and the trees are shown along Vital Way.

The master plan, under commercial centers, page 26, states the objectives. Provide guidance for future improvements and development within the commercial centers to strength community identity. Enhance one's sense of place at the pedestrian scale and best serve the needs of the community. Promote retail and pedestrian activity along the streets within the commercial centers. Encourage civic spaces such as plazas, park areas or seating areas within shopping areas to promote social interaction and improve sense of community.

In Mr. Foster's opinion, this plan is consistent with these recommendations. Strengthening community identity and enhancing one's sense of place at a pedestrian scale. Petitioner is trying to reinforce that edge along Vital Way using street furniture, an urban pedestrian streetscape, street trees, and narrowing the paving, making it safer for pedestrians along Vital Way. All of this will be consistent with the streetscape requirements in the master plan.

On page 32 there's specific requirements about the Colesville commercial center. It requires properties along Vital Way in the southeast quadrant of New Hampshire Avenue and Randolph Road to develop or redevelop in a manner that provides a more unified main street form of development. The main street form suggests that buildings should be adjacent to the public sidewalk with parking to the rear. This project is consistent with that form, with the building along Vital Way, the parking behind the building and hidden from view. And that helps define the pedestrian realm.

Important sidewalk connections, on street parking, street trees, were also proposed as part of this main street theme. And again, the site has been designed with a single access point to limit possible conflicts between vehicles and pedestrians who are using Vital Way.

There is a section about improving vehicular and pedestrian access between Colesville shopping center and the commercial properties along Vital Way. Vital Way currently has only a

right-in, right-out intersection with Randolph Road. There's a median. There is a left into the Colesville commercial center, or Colesville shopping center, but there is no cross over traffic. As part of this development, Petitioner will be realigning the end of Vital Way slightly. So if sometime in the future there was ever the possibility of the intersectional improvement, this change would help.

And again, under road networks, the Master Plan goes into the same commercial business district streets. Improve Vital Way as a two lane commercial business district street between Randolph Road and New Hampshire Avenue. With the proposed PAMR improvements, Petitioner will be reducing that current four lane road down to two lanes of travel with parking on either side to really enhance and mark where those pedestrians can walk, reducing those crossing distances, and improving the streetscape and the commercial viability of this area, not just for this project, but for the projects across the street and for other projects along Vital Way in the future.

Exhibit 53 is a photograph of Vital Way from the median of Randolph Road and looking in the southeast direction from Randolph Road down to New Hampshire Avenue. The subject property is immediately on the left side of this exhibit, where there is open ground. Just behind that is the existing Asian restaurant. On the right side of the photograph there is the entrance to the animal hospital and beyond that existing retail. The photo shows the unfinished nature of Vital Way. Close to Randolph Road, it narrows down where the road has not been improved at all. Much of the right of way has already been dedicated. Petitioner can do the improvements on the opposite side of Vital Way. All of the improvements on Vital Way, Petitioner is proposing as part of PAMR.

In Mr. Foster's opinion, the proposed special exception will be in harmony with the general character of the neighborhood, considering population density, design, scale, and bulk of any proposed new structures, intensity and character activity, traffic and parking conditions, and number of similar uses. The density, design, scale and bulk of the proposed development will be compatible with the Colesville Commercial Center, and will help jump start the main street vision of Vital Way. There

will be no negative traffic impacts from the proposed use, and there will be adequate parking and circulation provided on site. There will also be additional on-street parking that will be outlined as part of the improvements along Vital Way.

There will not be an over abundance of similar uses to this, as there is only one other drive-thru restaurant in the Colesville Commercial Center, and that is the McDonald's located on the opposite side of the Colesville Commercial Center, on the northeast quadrant of Randolph Road and New Hampshire Avenue. There is one other special exception which is directly across the street, which is the veterinary and animal hospital. In Mr. Foster's opinion, the low intensity of that use, coupled with this, will not create any adverse impacts upon the surrounding area or this neighborhood. These are the two special exceptions in the neighborhood.

The proposed uses will not generate any adverse traffic impacts to the neighborhood, and the siting of the building and the improvements along Vital Way, will add to the economic vitality of the area. The proposed special exception will not cause any objectionable noise, vibration, fumes, dust, illumination, glare or physical activity on the subject site that are beyond the inherent impacts of the proposed use, and it will also be a redevelopment of a currently vacant property that will enhance the neighborhood.

There will be no sales during the morning peak hour trips, so there will be no traffic impacts then. Deliveries and trash removal are being scheduled on off peak hours. Trash dumpsters are enclosed. Cooking oil is being recycled and hauled off site, and lighting, using cut-off fixtures, will be appropriate for the site. It will not cause any glare or lighting escape into nearby residential zones.

Mr. Foster opined that the proposal will not effect the health, safety, security, morals or general welfare of the residents, visitors or workers in the area. It will meet or exceed all of the zoning code and any other operational requirements for the site. The project will replace what was a vacant

building and now an empty site, will improve pedestrian safety, vehicular circulation and provide for employment for the youth in the neighborhood.

In his opinion, the proposed use on the subject property will be served by adequate public facilities, including police, fire protection. It has adequate water and sanitary sewer service, public roads, adequate storm drainage and will have no impact on the local school system. This project will be going through preliminary plan and the actual findings for public facilities will be made by the Planning Board at that time. This project will have no impact on the local area of road network, and Petitioner will be meeting the policy area mobility review. The proposed special exception use will be compatible with the surrounding area and uses.

4. Robert Saunders (Tr. 75-83):

Robert Saunders testified as an expert in architecture. The structure that has been proposed for the special exception is the present standard building that Wendy's is using. It's an all brick building, with two feature strips of split face concrete, one at the sill line of the windows, and one at the head of the windows. The building elevations are shown in Exhibit 55. These elevations are the standard 2878 building that Wendy's is using, with a cashier window and a drive up window. There are fascia above three sides of the dining area which is copper colored. The sign is on the fascia.

There will be a decorative light fixture that's placed on the band at the head of the windows, and this band goes all the way around the building. That's the split face concrete. These decorative lights shine up and shine down and wash the side of the building.

Exhibit 57 shows the specifications for the strip lighting, fluorescent lighting that will be above the fascia in all three fascias. This is an indirect light that splashes the fascia with light. There will be a trapezoidal light above the cashier, the drive up window, the cashier's window, and also above the rear entrance. These are down lighting flood lights that add light in those particular cases.

The height of the building as proposed for the site is 20 feet. In Mr. Saunder's opinion, the architectural design of the Wendy's planned for this site will be compatible with the surrounding uses and designs.

5. Thomas Flynn (Tr. 85-95):

Thomas Flynn testified as an expert in economic analysis and needs analysis as specified in the county zoning ordinance. He was charged with determining whether or not a need exists in the community, and in the county as a whole for a use of this type.

He began his work by visiting the site and walking through the area and driving the roads, Randolph Road and New Hampshire, and other roads in the vicinity to understand what to consider the neighborhood or community so as to delineate the market area. He determined it to be the area within a four minute drive of the site. That happens to correspond essentially with the Colesville community. He then reviewed all of the potentially competitive establishments, fast food and convenience food, dining establishments in the area. There are 12 of them, and he visited each one.

Mr. Flynn also conducted an intercept survey, and interviewed approximately 31 people who were in the area. Some of them were residents. Some were people traveling through the area. Others were people shopping in the area. He asked them whether they felt that there was a need for a restaurant at the subject site.

Mr. Flynn also obtained an estimate of actual retail sales and need, and potential need for more sales by specific area within the defined market area, from a company called Claritas, which is an international company that specializes in providing data on retail sales. On that basis, he identified a retail gap, of over \$6 million in this type of establishment. That clearly indicated to him that there was a market basis and a need in the community for the type of establishment that was being contemplated here.

Mr. Flynn looked at the county as a whole, and based on the figures available, estimated a need or gap of about \$220 million in establishments of this type. So there was, based on these calculations, a need within the community in which a majority of the people felt that there was a need for more options in terms of dining. This is summarized in his report of July 2008 (Exhibit 14).

Mr. Flynn noted that Technical Staff had expressed the view that he had considered only the residents of this four minute drive area, and had failed to take into account people who work in the area and people who are traveling through. According to Mr. Flynn, the figures that he used take all three of those sources into account. The resident population, people who work in the area, and people on the roads. The vehicle traffic is very significant. Had he not considered them, his estimates of demand would actually be greatly understating the need that does exist.

In Mr. Flynn's opinion, a need exists for the proposed use due to an insufficient number of similar uses presently serving existing population concentrations in the county. The proposed drive-in restaurant use will not result in a multiplicity or saturation of similar uses in the neighborhood of the site.

When questioned by the Hearing Examiner about Technical Staff's statement in their report (p. 23) that he did not account for menu or food concept differences among the applicant's sample, square footage of each establishment, estimated annual sales and distance from the proposed subject site, Mr. Flynn responded that page 3-1 showed the locations of all of the establishments; page 3-1 and 3-2, in the table, the type of establishment, whether it serves alcohol, whether there's drive thru and the address location; and on page 3-3, a discussion of the competitive ones; the type of service; the type of food that they provide; in what ways they are competitive; and the total sales associated with these establishments. He did not feel that the square footage of each of those establishments was particularly relevant in this case.

6. Mickey Cornelius (Tr. 95-118; 121-123):

Mickey Cornelius testified as an expert in traffic engineering and transportation planning. He analyzed the special exception in terms of its traffic impacts, and prepared a report (Exhibit 25(o)). The traffic report addresses both the local area transportation review and the policy area mobility review requirements of Montgomery County. None of the findings, analysis or conclusions will change because of the revision to the site plan in which two parking spaces were added.

The scope of the traffic study was provided by Montgomery County Park and Planning, Transportation Planning staff. That scope required an analysis of five intersections. Three intersections are along Randolph Road. The primary intersection in the area is the intersection of New Hampshire Avenue which runs north/south, and Randolph Road which traverses east/west. That intersection is signalized. Both roads six lane divided major highways. As you travel to the west on Randolph Road from New Hampshire Avenue, the intersection of Vital Way and Randolph Road was the next intersection that was studied, and that was due to the fact that that would be a primary intersection which would allow people to enter and exit the subject property. Further to the west, along Randolph Road, the next signalized intersection is with Locksley Lane. That was the third intersection on Randolph Road that was evaluated. On New Hampshire Avenue, traveling south on Vital Way, southeast from the site, the intersection of Vital Way and New Hampshire Avenue was evaluated, and that's an unsignalized intersection. The next signalized intersection south of that was the intersection of New Hampshire Avenue and Wolf Drive. That was the fifth and final intersection evaluated.

Because the proposed restaurant would not be open for breakfast, a morning peak hour analysis was not required. Evening peak hour traffic counts were conducted at those five intersections during the hours of 4:00 to 7:00 p.m., and existing traffic conditions were identified in terms of critical lane volume (CLV).

The subject property is located in the Fairland/White Oak policy area where the CLV, critical lane volume congestion standard is 1475. The analysis showed that four of the five intersections were currently operating with CLVs below 1475. The intersection of New Hampshire Avenue and Randolph Road is currently operating with a CLV of 1485. So it is five critical movement above the standard.

With the addition of background development, other planned approved developments, once again, four of the five intersections were projected to maintain CLVs less than 1475. The intersection of Randolph Road and New Hampshire Avenue was projected to operate with a CLV of 1490.

The next step in the analysis was to generate traffic for the property and assign that to the road system. One of the primary components of a traffic analysis for this type of restaurant which is a drive-thru, fast food restaurant, is given the effect of pass-by trips. A lot of people going to this type of facility, especially during peak hours, are motorists who are already on the road system. They're either driving to or from one place or another, or they're passing by the site on the road system. Studies have shown and the Institute of Transportation Engineers has documented a pass-by rate of approximately 50 percent during peak hours for this type of facility, and that pass-by rate is accepted by Montgomery County.

Thus, in evaluating the total trips projected to be generated by the Wendy's restaurant, half of those were expected to be new to the surrounding area road system, and the other half were expected to be trips that were just drawn off the surrounding roadways.

Because Vital Way intersections north and south of the site are both basically right-in, right-out access points, traffic cannot proceed westbound on Randolph Road and make a left turn into Vital Way. They can make a U-turn just past there at the next intersection, and they cannot make a left turn out of Vital Way to go westbound on Randolph Road. Similarly, on Maryland 650, New Hampshire

Avenue, there is a median across the Vital Way intersection so that only provides right-in, right-out movements.

In order to make some movements into the site from various roadways, a lot of those are movements that are made at the intersection of New Hampshire Avenue and Randolph Road. When you look at the overall key directions of travel, for the evening peak hour, the critical lane movements at that intersection are the northbound through movement on New Hampshire Avenue and the opposing southbound left turn movement on New Hampshire Avenue. Those are the critical north/south movements. So when you're determining the 1475 critical lane volume, it really depends on how much traffic you have traveling straight through northbound and southbound left turns.

From the east/west direction the evening peak hour, the critical movement is an eastbound through movement and the opposing westbound left turn movement. So when one examines new traffic generated by Wendy's restaurant, any new traffic that's coming from the west on Randolph Road, making a right into Vital Way going into the site, would not enter the critical lane volume. If you're exiting the site, and you want to go back to the west, you have your choice of coming down and going down 650 and coming back another street, or you can come out, make a right turn, and then make a U-turn at the signalized intersection of New Hampshire Avenue. Once again, that left turn or U-turn movement traveling eastbound is not a critical movement. So anyone generated by the site who makes that movement does not effect the critical lane volume.

Similarly for the southbound traffic, anyone coming from the north to go to the subject property in the evening peak hour, whether they turn right and make a U-turn to get there, or whether they travel straight through, once again, they're not in the critical movement. The critical movement is northbound through plus the opposing southbound left.

The bottom line is, of the 44 new trips that are generated in the evening peak hour,

approximately 22 inbound, 22 outbound,¹² only a couple of them actually impact the critical movements to the intersection. When you consider the pass-by trips, pass-by trips are going to be drawn primarily from Randolph Road eastbound and westbound, New Hampshire Avenue, northbound and southbound. Vital Way is a road that doesn't carry a lot of traffic, so you wouldn't really expect pass-by trips just coming off of Vital Way. Those trips would actually come off of the major highways which are Randolph Road and New Hampshire Avenue. The only movement that really affects the critical lane volume for the pass-by trips is the northbound movement on New Hampshire in the evening peak hour.

For motorists who decide they're going to stop at Wendy's, and then leave, they actually would come out of the through lane, which is a critical lane, go into the left turn lane, which is a non-critical lane, so you end up taking a couple of vehicles out of the critical movement. Tr. 103-104. That's the reason why, when you total up the impact of the pass-bys and the new trips, the overall impact to the critical lane volume at the intersection of New Hampshire Avenue and Randolph Road is zero. There are a couple of critical lane impacts to it, but at the same time when you're taking some traffic out of critical movements and putting them into other lanes, then they take those movements out of the existing critical movement and it ends up balancing out and has no impact on the CLV at that intersection. The pass-bys neutralize the additional critical lane movements added because they are now taking out of the critical lane path and now into a non-critical path.

Under the LATR standards, even though the intersection will continue to exceed the critical lane volume as specified for the area, this proposal still passes LATR because the total impact will not add any critical lane volume to that offending intersection. Under the LATR guidelines, if you have an intersection that's operating above the congestion standard, you can satisfy LATR as long as you have no impact to that CLV, and in this case, Petitioner will have no impact to the CLV. But

¹² These figures were an approximation. The actual figures were 23 inbound and 21 outbound. Exhibit 32, p. 10.

Petitioner still has to meet the PAMR requirements of mitigating.

The second portion of the study was to look at the PAMR requirements. In the Fairland/White Oak policy area there's a 45 percent trip mitigation requirement for PAMR. In order to satisfy that, Park and Planning and Department of Transportation requested that the PAMR improvements be focused on Vital Way and starting to develop Vital Way in accordance with the master plan. As such, the PAMR improvements that were proposed in order to mitigate 20 trips (*i.e.*, 45% of 44 new trips), the reconstruction of Vital Way was proposed approximately 300 feet from the intersection of Randolph Road past the existing site. That would include reconstructing the existing road, bringing out the curb line with on-street parking and then bumping out the curb line to provide a more narrow road, where parking wasn't provided. There's an existing four foot sidewalk for a portion of the east side of Vital Way. Petitioner will take that sidewalk out and replace it with an eight foot wide sidewalk with street trees, and also do the same thing on the other side. There is no sidewalk that currently exists there. Handicap pedestrian ramps will be provided at the intersection of Vital Way and Randolph Road. There will be Handicap ramps at the reconstructed access drives, as required, and a pedestrian refuge island.

Mr. Cornelius also responded to questions raised by Mr. McCluskey of GCCA by referring to the response of Gregory Leck at the Department of Transportation (Exhibit 49). As part of the master plan for this area, there was the suggestion of signaling the intersection at Randolph Road and Vital Way. To do so, the intersection would have to be reconstructed so that Vital Way and the access to the Colesville Shopping Center on the north side would come in at a 90 degree and make a full signalized intersection. At that point, it would be a full intersection so you could make left turns, through movements at all locations. Although Vital Way, as part of this project, is being realigned somewhat, the problem is the access to Colesville shopping center today, which comes in at an angle. Greg Leck pointed out in the county's letter, in order to reconstruct this intersection and to have

signalizations to allow those movements, you'd need to have something done on the Colesville Shopping Center side to get that access to come in and intersect at 90 degrees. At this point, there's no proposal to do it, and the County has no desire at this point to do that. Moreover, even if the alignment were set up, there's about 300 feet of distance between that intersection and the intersection of New Hampshire and Randolph Road, which is much less distance than typically desired for the distance between signalized intersections. Finally, there is not enough traffic northbound on Vital Way to warrant signalization based upon traffic volumes at the intersection.

As to proposed crosswalks, you could only have one across Randolph Road if you were going to signalize and stop that traffic. Park and Planning and Department of Transportation felt that the narrowing of Vital Way, providing the on street parking with the curb bump outs, is the first step to try to reduce travel speeds in that area. At this point, until there's an actual noted need from a pedestrian standpoint for crossing Vital Way, they did not desire to have any raised pedestrian cross-walks.

Mr. Cornelius opined that the proposed site has been designed for the maximum of the safety for vehicular and pedestrian traffic. The site has been designed with a single access on Vital Way which is 22 feet in width. Typically you would find two access points to this type of facility. So from that respect, Petitioner has narrowed the pedestrian-vehicular conflicts to a single 22 foot wide access point, which is consistent with the master plan for this area. Sidewalks are being constructed on both sides of Vital Way, reconstructed along sections of Randolph Road. Thus pedestrian circulation and pedestrian safety are being improved adjacent to the subject property.

As one exits the subject property, there's very little traffic that proceeds northbound. Most of that traffic would likely make a right turn out to Randolph Road, and as you come into the site from Randolph Road, once again, there's very little oncoming traffic traveling northbound, so that movement is relatively unimpeded, and therefore, there's really not much vehicular conflict at that location. Overall, with the single access drive, the circulation pattern as proposed, the PAMR

improvements that are being provided here, it is Mr. Cornelius's opinion that there's a net benefit to pedestrian safety in this area. As to vehicular safety, any time you add a new access point you add a point of interaction. But in this case, Petitioner has kept it to one location as a safe place to enter and exit the road. So in his opinion, it's been designed to achieve maximum safety, and internal vehicle and pedestrian circulation, as well as points of external access, will be safe, adequate and efficient.

Mr. Cornelius opined that the special exception will be in harmony with the general character of the surrounding area considering traffic and parking conditions, and it will not create any traffic hazard or nuisance because of its location or relation to similar uses. This proposal will not have any adverse effects on the transportation, and there are adequate transportation facilities to serve this project. Moreover, it will not create any queuing on Vital Way of cars waiting to be served. The circulation route through the parking lot provides for a person who enters from Vital Way, proceeds into the lot, traverses along the east side traveling southbound on the back of the lot, and then circles back around the building. You could probably stack a dozen cars within the site and not be impacting Vital Way.

The Hearing Examiner raised a concern about internal circulation, in that there is no sign which tells an entering motorist not to turn right immediately, going the wrong way in the queue line. Mr. Cornelius stated that a warning can be done with one-way painting or similar device. Petitioner's counsel agreed to revise the plans accordingly.

IV. FINDINGS AND CONCLUSIONS

A special exception is a zoning device that authorizes certain uses provided that pre-set legislative standards are met, that the use conforms to the applicable master plan, and that it is compatible with the existing neighborhood. Each special exception petition is evaluated in a site-specific context because a given special exception might be appropriate in some locations but not in others. The zoning statute establishes both general and specific standards for special exceptions, and

the Petitioner has the burden of proof to show that the proposed use satisfies all applicable general and specific standards. Based on the testimony and evidence of record, the Hearing Examiner concludes that the instant petition meets the general and specific requirements for the proposed use, as long as Petitioner complies with the conditions set forth in Part V, below.

A. Standard for Evaluation

The standard for evaluation prescribed in Code § 59-G-1.2.1 requires consideration of the inherent and non-inherent adverse effects on nearby properties and the general neighborhood from the proposed use at the proposed location. Inherent adverse effects are “the physical and operational characteristics necessarily associated with the particular use, regardless of its physical size or scale of operations.” Code § 59-G-1.2.1. Inherent adverse effects, alone, are not a sufficient basis for denial of a special exception. Non-inherent adverse effects are “physical and operational characteristics not necessarily associated with the particular use, or adverse effects created by unusual characteristics of the site.” *Id.* Non-inherent adverse effects, alone or in conjunction with inherent effects, are a sufficient basis to deny a special exception.

Technical Staff have identified seven characteristics to consider in analyzing inherent and non-inherent effects: size, scale, scope, light, noise, traffic and environment. For the instant case, analysis of inherent and non-inherent adverse effects must establish what physical and operational characteristics are necessarily associated with a drive-in restaurant. Characteristics of the proposed drive-in restaurant use that are consistent with the “necessarily associated” characteristics of drive-in restaurant uses will be considered inherent adverse effects, while those characteristics of the proposed use that are not necessarily associated with drive-in restaurant uses, or that are created by unusual site conditions, will be considered non-inherent effects. The inherent and non-inherent effects thus identified must then be analyzed, in the context of the subject property and the general

neighborhood, to determine whether these effects are acceptable or would create adverse impacts sufficient to result in denial.

Technical Staff determined that the physical and operational characteristics necessarily associated with a drive-in restaurant include (Exhibit 32, p. 13):

- (1) the building housing the restaurant,
- (2) parking facilities,
- (3) lighting,
- (4) noise generated by vehicles using the drive-in,
- (5) vehicular trips to and from the site by patrons and employees, and
- (6) long hours of operation.

Technical Staff concluded that “No non-inherent adverse effects are associated with the proposed special exception.” Exhibit 32, p. 14.

Petitioner’s land planner, Kevin. Foster, stated that there are some non-inherent characteristics to the site, but they are not adverse characteristics. Tr. 56-57. Rather, they are all positive. In this case, the building is placed along Vital Way to create a pedestrian activity zone along Vital Way and create an architectural edge. The site access is limited to one access point, where typical drive-through restaurants usually have multiple access points, so that limits interaction between vehicles and pedestrians. All of the parking activity is behind or to the side of the building, and the focus is on the pedestrian main street that is being created a long Vital Way. The site was designed in this fashion to comply with the language in the Master Plan.

In addition to the features mentioned by Mr. Foster, the Hearing Examiner finds two additional non-inherent characteristics of this site, a small outdoor patron area and the fact that the single access to the site is only 75 feet from the nearest intersection, a distance less than the 100 feet preferred by DOT. As discussed in Part II. G. of this report, all the expert evidence supports the conclusion that the short distance to the intersection is acceptable in this case. There is no evidence that the existence of the small outdoor patron area will create any adverse effects on the community, and it may even have the opposite effect of adding to the street life. The Hearing Examiner also

agrees with Mr. Foster's conclusion that the non-inherent characteristics he mentioned will have no adverse effects.

The Hearing Examiner concludes that there are no non-inherent adverse effects that would warrant denial of this petition.

B. General Conditions

The general standards for a special exception are found in Section 59-G-1.21(a). The Technical Staff reports, the other exhibits and the testimony of the Petitioner's witnesses provide ample evidence that the general standards would be satisfied in this case.

Sec. 59-G-1.21. General conditions.

§5-G-1.21(a) -*A special exception may be granted when the Board, the Hearing Examiner, or the District Council, as the case may be, finds from a preponderance of the evidence of record that the proposed use:*

(1) Is a permissible special exception in the zone.

Conclusion: A drive-in restaurant use is a permissible special exception in the C-1 Zone, pursuant to Code § 59-C-4.2(d).

(2) Complies with the standards and requirements set forth for the use in Division 59-G-2. The fact that a proposed use complies with all specific standards and requirements to grant a special exception does not create a presumption that the use is compatible with nearby properties and, in itself, is not sufficient to require a special exception to be granted.

Conclusion: The proposed use complies with the specific standards set forth in § 59-G-2.16 for a drive-in restaurant use, as outlined in Part C, below.

(3) Will be consistent with the general plan for the physical development of the District, including any master plan adopted by the Commission. Any decision to grant or deny special exception must be consistent with any recommendation in a master plan regarding the appropriateness of a special exception at a particular location. If the Planning Board or the Board's technical staff in its report on a special exception concludes that granting a particular special exception at a

particular location would be inconsistent with the land use objectives of the applicable master plan, a decision to grant the special exception must include specific findings as to master plan consistency.

Conclusion: The property is located within the area covered by the White Oak Master Plan, as amended, approved and adopted in 1997. For all the reasons discussed at length in Part II. C. of this report, the Hearing Examiner finds that the planned use is consistent with the applicable Master Plan.

(4) Will be in harmony with the general character of the neighborhood considering population density, design, scale and bulk of any proposed new structures, intensity and character of activity, traffic and parking conditions, and number of similar uses. The Board or Hearing Examiner must consider whether the public facilities and services will be adequate to serve the proposed development under the Growth Policy standards in effect when the special exception application was submitted.

Conclusion: The proposed use will be in harmony with the general character of the neighborhood because it will be a commercial use in a commercial zone and will be designed to reflect the streetscape features recommended in the Master Plan. The proposed use will generate additional traffic and parking, as discussed in Parts II. B and D of this report, but that additional traffic will not raise traffic congestion at affected intersections to unacceptable levels, and Petitioner will provide all the on-site parking required by the Zoning Ordinance. The adequacy of public facilities will be finally determined at subdivision, but there is sufficient evidence at this juncture to support a finding of adequacy, subject to the Planning Board's review of the details. Thus, the subject use will be in harmony with its surroundings.

(5) Will not be detrimental to the use, peaceful enjoyment, economic value or development of surrounding properties or the general neighborhood at the subject site, irrespective of any adverse effects the use might have if established elsewhere in the zone.

Conclusion: The Hearing Examiner concludes that the proposed use will not be detrimental to the peaceful enjoyment, economic value or development of surrounding properties at the site. As noted by Technical Staff (Exhibit 32, p. 16), “the proposed restaurant building is replacing a . . . vacant structure that has not been well maintained rendering the site unattractive and blighted. As such, the proposed redevelopment of the property will have a positive impact on existing and future development of properties in the neighborhood and help to improve the vitality of this mixed-use neighborhood.”

- (6) *Will cause no objectionable noise, vibrations, fumes, odors, dust, illumination, glare, or physical activity at the subject site, irrespective of any adverse effects the use might have if established elsewhere in the zone.*

Conclusion: Given its location and the nature of the proposed use, no objectionable noise, vibrations or dust will be generated. As observed by Technical Staff (Exhibit 32, p. 16), “all deliveries will be scheduled outside of the morning and evening peak hours and outside the restaurant’s peak lunchtime operation. . . . The plan also provides for safe and appropriate pedestrian circulation around the site. Lighting will not reflect or cause glare into any residential zone. Sufficient lighting is provided on and near the site for the patrons and employees of the restaurant.” Trash dumpsters are enclosed, and trash pickups are being scheduled during off peak hours. Cooking oil will be recycled and hauled off site. Tr. 69. Based on the record, the Hearing Examiner finds that Petitioner will be compliant with this section.

- (7) *Will not, when evaluated in conjunction with existing and approved special exceptions in any neighboring one-family residential area, increase the number, intensity, or scope of special exception uses sufficiently to affect the area adversely or alter the predominantly residential nature of the area. Special exception uses that are consistent with the recommendations of a master or sector plan do not alter the nature of an area.*

Conclusion: The site is not in a residential zone, and it is surrounded with commercially developed properties, so this section is of questionable applicability. Moreover, the proposed use is consistent with the applicable Master Plan, so by definition, it will not alter the nature of the area. Technical Staff has identified one approved special exception use in the vicinity of the subject property (directly across from the property on Vital Way). That special exception use is for an animal hospital and veterinary clinic (No. S-97). Technical Staff concluded, as does the Hearing Examiner, that the proposed special exception will have no adverse effect on any one-family residential area. Exhibit 32, p. 16.

(8) *Will not adversely affect the health, safety, security, morals or general welfare of residents, visitors or workers in the area at the subject site, irrespective of any adverse effects the use might have if established elsewhere in the zone.*

Conclusion: For the reasons set forth in answer to previous sections, the evidence supports the conclusion that the proposed use would not adversely affect the health, safety, security, morals or general welfare of residents, visitors or workers in the area at the subject site.

(9) *Will be served by adequate public services and facilities including schools, police and fire protection, water, sanitary sewer, public roads, storm drainage and other public facilities.*

Conclusion: The evidence supports the conclusion that the proposed special exception would be adequately served by the specified public services and facilities, as discussed in Part II. D. of this report. The site has both public water and sewer access, and DPS has approved a stormwater concept plan. By its nature, the use does not burden public

schools. Police and fire protection are presumed adequate by the Growth Policy unless those agencies specify otherwise, which they have not.

- (A) *If the special exception use requires approval of a preliminary plan of subdivision, the Planning Board must determine the adequacy of public facilities in its subdivision review. In that case, approval of a preliminary plan of subdivision must be a condition of the special exception.*
- (B) *If the special exception does not require approval of a preliminary plan of subdivision, by the Board of Appeals must determine the adequacy of public facilities when it considers the special exception application. The Board must consider whether the available public facilities and services will be adequate to serve the proposed development under the Growth Policy standards in effect when the special exception application was submitted.*

Conclusion: The special exception sought in this case would require approval of an amended preliminary plan of subdivision. Technical Staff has indicated that the adequacy of public facilities to serve the proposed use will be determined at subdivision. Exhibit 32, p. 17. Even though the public facilities review will be done by the Planning Board at subdivision, and approval of the Preliminary Plan will be a condition of this special exception, the evidence in the record supports the conclusion that public facilities will be adequate. As discussed in Part. II. D. of this report, a traffic analysis was done by Petitioner's transportation planner, and he determined that the only intersection which exceeds the CLV standard for the policy area will not be worsened by the proposed use. All other impacted intersections are currently operating within the CLV standard prescribed for this area and are anticipated to be at acceptable levels under both the background and total development conditions. Technical Staff confirms these findings. Exhibit 32, pp. 8-12. Technical Staff also indicates that Policy Area

Mobility Review (PAMR) will be satisfied in this case by conditions to be imposed at subdivision. The Hearing Examiner finds that Petitioner has made a sufficient showing that public facilities will be adequate at this stage.

- (C) *With regard to public roads, the Board or the Hearing Examiner must further find that the proposed development will not reduce the safety of vehicular or pedestrian traffic.*

Conclusion: Technical Staff agreed with Petitioner's traffic engineer, Mickey Cornelius, that "With the recommended conditions, the use is not expected to reduce the safety of vehicular or pedestrian traffic." Exhibit 32, p. 18. Despite concerns raised by the community and discussed at length in Part II. G. of this report, the weight of the evidence supports the conclusion that the proposed use would have no detrimental effect on the safety of vehicular or pedestrian traffic.

C. Specific Standards

The testimony and the exhibits of record, including the Technical Staff reports, provide sufficient evidence that the specific standards required by Section 59-G-2.16 are satisfied in this case, as described below.

Sec. 59-G-2.16. Drive-in restaurants.

A drive-in restaurant may be allowed, upon a finding, in addition to findings required in division 59-G-1, that:

- (a) *The use will not constitute a nuisance because of noise, illumination, fumes, odors or physical activity in the location proposed.*

Conclusion: For the reasons discussed in response to §59-G-1.21(a)(6) in Part IV. B. of this report, the proposed use will not constitute a nuisance because of noise, illumination, fumes, odors or physical activity in the location proposed.

(b) The use at the proposed location will not create a traffic hazard or traffic nuisance because of its location in relation to similar uses, necessity of turning movements in relation to its access to public roads and intersections, or its location in relation to other buildings or proposed buildings on or near the site and the traffic patterns from such buildings or cause frequent turning movements across sidewalks and pedestrian ways, thereby disrupting pedestrian circulation within a concentration of retail activity.

Conclusion: The issue of traffic safety was discussed at length in Parts II. G. of this report.

Technical Staff concluded (Exhibit 32, p. 24): “With the recommended conditions, the proposed use will not create a traffic hazard or traffic nuisance on or near the subject site or the adjoining roads.” Considering the entire record in this case, the Hearing Examiner finds that the use at the proposed location will not create a traffic hazard or traffic nuisance for any of the reasons set forth in this section.

(c) The use of the proposed location will not preempt frontage on any highway or public road in such manner so as to substantially reduce the visibility and accessibility of an interior commercial area zoned or proposed for commercial use which is oriented to the same highway or public road.

Conclusion: Technical Staff reports “The proposed use will not preempt frontage on any highway or public road.” Exhibit 32, p. 24. There is no evidence to the contrary, and the Hearing Examiner so finds.

(d) When such use abuts a residential zone or institutional premises not recommended for reclassification to commercial or industrial zone on an adopted master plan and is not effectively screened by a natural terrain feature, the use shall be screened by a solid wall or a substantial, sightly, solid fence, not less than 5 feet in height, together with a 3-foot wide planting strip on the outside of such wall or fence, planted in shrubs and evergreens 3 feet high at the time of original planting and which shall be maintained in good condition. Location, maintenance, vehicle sight distance provisions, advertising and parking areas pertaining to screening shall be as provided for in the requirements contained in article 59-E.

Conclusion: This section is not applicable because the use itself does not abut a residential zone. It is located within the area identified in the White Oak Master Plan as the Colesville Commercial Center, and it is completely surrounded by commercial uses in the C-1 Zone.

(e) Product displays, parked vehicles and other obstructions which adversely affect visibility at intersections or at entrances and exits to and from, such use are prohibited.

Conclusion: The proposed use will not have product displays, parked vehicles or other obstructions which adversely affect visibility at intersections or at entrances and exits to and from the use. The parked vehicles will be located to the side and rear of the site.

(f) Lighting is not to reflect or cause glare into any residential zone.

Conclusion: The proposed lighting will not reflect or cause glare into any residential zone, as the subject site is not adjacent to a residential zone; it will use cut-off, shoe box type lighting fixtures that direct the light downward rather than out; and the site is adequately buffered by landscaping, intervening roads and other commercial uses.

(g) When such use occupies a corner lot, the ingress or egress driveways shall be located at least 20 feet from the intersection of the front and side street lines of the lot, as defined in section 59-A-2.1, and such driveways shall not exceed 25 feet in width; provided, that in areas where no master plan of highways has been adopted, the street line shall be considered to be at least 60 feet from the centerline of any abutting street or highway.

Conclusion: There is only one driveway. It is located more than 20 feet from the intersection and, at 22 feet in width, does not exceed the 25 foot minimum. It therefore complies with this section.

D. Additional Applicable Standards

59-G-1.22. Additional requirements.

(b) Using guidance by the Planning Board, the Board, the Hearing Examiner, or the District Council, as the case may be, may require a special exception to comply with Division 59-D-3 if:

- (1) The property is in a zone requiring site plan approval, or*
- (2) The property is not in a zone requiring site plan approval, but the Planning Board has indicated that site plan review is necessary to regulate the impact of the special exception on surrounding uses because of disparity in bulk or scale, the nature of the use, or other significant factors.*

Conclusion: Technical Staff notes that the subject property is located within a C-1 zoned area that is in excess of 15 contiguous acres. Therefore, “the property is subject to Site Plan Review pursuant to Section 59-C-4.341.2.” Exhibit 32, p. 18.

59-G-1.23. General development standards.

(a) Development Standards. Special exceptions are subject to the development standards of the applicable zone where the special exception is located, except when the standard is specified in Section G-1.23 or in Section G-2.

Conclusion: Petitioner’s engineer, David Weber, opined that the proposal satisfies all the dimensional requirements of the zone (Tr. 28-29), and Technical Staff agrees, as demonstrated by the following matrix from the Technical Staff report (Exhibit 32, p. 19), with corrections made by the Hearing Examiner, as noted:

Current Development Standards	Required	Proposed
Maximum Building Height	30 ft	30 ft ¹³
Minimum Building Setback from Master Plan R-O-W	10 ft	10 ft
Minimum Green Area	10%	19% ¹⁴
Parking Spaces: ¹⁵ 25 spaces per 1,000 SF of indoor patron area 15 spaces per 1,000 SF of outdoor patron area 917 SF of indoor patron area proposed 128 SF of outdoor patron area proposed	23 2	25

¹³ Petitioner notes that the actual height of the restaurant will be about 20 feet, so it will not exceed the 30 foot maximum. Tr. 30.

¹⁴ The amount of proposed green area went down by 1% from the 20% noted in the Technical Staff report because Petitioner added two parking spaces to account for a small outdoor patron area.

¹⁵ As discussed on page 16 of this report, the parking figures changed due to the addition of an outdoor patron area.

- (b) *Parking requirements. Special exceptions are subject to all relevant requirements of Article 59-E.*

Conclusion: As noted in Part II. B. of this report, and immediately above, Petitioner will provide all the parking spaces (25) required by Zoning Ordinance §59-E-3.7.

- (c) *Minimum frontage * * **

Conclusion: Not applicable to this special exception.

- (d) *Forest conservation. If a special exception is subject to Chapter 22A, the Board must consider the preliminary forest conservation plan required by that Chapter when approving the special exception application and must not approve a special exception that conflicts with the preliminary forest conservation plan.*

Conclusion: Not applicable. The use is exempt per Exhibit 7(a). There is no forest on site.

- (e) *Water quality plan. If a special exception, approved by the Board, is inconsistent with an approved preliminary water quality plan, the applicant, before engaging in any land disturbance activities, must submit and secure approval of a revised water quality plan that the Planning Board and department find is consistent with the approved special exception. Any revised water quality plan must be filed as part of an application for the next development authorization review to be considered by the Planning Board, unless the Planning Department and the department find that the required revisions can be evaluated as part of the final water quality plan review.*

Conclusion: Not applicable. A water quality plan is not required since the site is not in a Special Protection Area. Petitioner's storm water management concept plan has been approved by the Department of Permitting Services (DPS), in a letter dated December 1, 2008. Exhibit 25(i).

- (f) *Signs. The display of a sign must comply with Article 59-F.*

Conclusion: Signage information is contained on Petitioner's elevations (Exhibit 55), on the revised Site Plan (Exhibit 59(a)) and on the Site Details (Exhibit 59(b)). Technical

Staff notes that this information was incomplete, and that Petitioner must provide more definitive information regarding all proposed signs at site plan review by the Planning Board. Exhibit 32, p. 20. A condition is recommended requiring Petitioner to have a permit prior to the posting of any sign and requiring that any changes to the signage details shown on Exhibits 55, 59(a) and 59(b) be submitted to the Board of Appeals following Site Plan Review by the Planning Board. The Hearing Examiner finds that the signage proposed thus far is consistent with the type of use proposed, and compliance with Article 59-F can be achieved by obtaining the required permits.

(g) *Building compatibility in residential zones. . . .*

Conclusion: Not applicable. The site is not in a residential zone.

(h) *Lighting in residential zones. All outdoor lighting must be located, shielded, landscaped, or otherwise buffered so that no direct light intrudes into an adjacent residential property. The following lighting standards must be met unless the Board requires different standards for a recreational facility or to improve public safety:*

- (1) *Luminaires must incorporate a glare and spill light control device to minimize glare and light trespass.*
- (2) *Lighting levels along the side and rear lot lines must not exceed 0.1 foot candles.*

Conclusion: The site is not in a residential zone, nor does it produce any light that will intrude into a residential zone.

59-G-1.25. County need.

In addition to the findings of Article 59-G, the following special exceptions may only be granted when the Board, the Hearing Examiner, or the District Council, as the case may be, finds from a preponderance of the evidence of record that a need exists for the proposed use due to an insufficient number of similar uses presently serving existing population concentrations in the County, and the uses at the location proposed will not result in a multiplicity or saturation of similar uses in the same general neighborhood:

- (1) *Eating and drinking establishments—Drive-in restaurant.*

Conclusion: Since the Zoning Ordinance requires a showing of “County need,” to qualify for a “drive-in restaurant” special exception, Petitioner produced a market analysis by Thomas Flynn, an expert in the field. For all the reasons discussed in Part II. F. of this report, the Hearing Examiner finds that a need exists for the proposed use due to an insufficient number of similar uses presently serving existing population concentrations in the County, and the use at the location proposed will not result in a multiplicity or saturation of similar uses in the same general neighborhood.

59-G-1.26. Exterior appearance in residential zones.

* * *

Conclusion: Not applicable. The site is not in a residential zone.

Based on the testimony and evidence of record, I conclude that the drive-in restaurant use proposed by Petitioner, as conditioned below, meets the specific and general requirements for the special exception, and that the Petition should be granted, subject to the conditions set forth in Part V of this report.

V. RECOMMENDATION

Based on the foregoing analysis, I recommend that Petition No. S-2736, seeking a special exception for a drive-in restaurant use at the southeastern corner of the intersection of Vital Way and Randolph Road in Silver Spring, Maryland (Lot 22 of the George W. Acorn’s Addition to Colesville Subdivision, on Plat No. 23775), be GRANTED, with the following conditions:

1. Petitioner shall be bound by all of its testimony and exhibits of record, and by the testimony of its witnesses and representations of counsel identified in this report.

2. The Applicant must limit development on the property to a drive-in restaurant with 2,552 square-feet of floor area. The use may have no more than 917 square feet of indoor patron area, and there may be no more than 128 square feet of outdoor patron area.
3. The Applicant must provide 25 parking spaces on site.
4. The restaurant must not have more than 50 employees (including a manager), and not more than 10 employees on site at any given time.
5. The hours of operation for the restaurant are from 10:00 a.m. to 11:00 p.m., seven days a week, for the dining room, and 10:00 a.m. to 2:00 a.m., seven days a week, for the drive-through.
6. The adequacy of public facilities must be determined by the Planning Board at the time of subdivision review in this case. Therefore, subdivision approval is a condition of approval of this special exception.
7. Petitioner must meet the specifications of its revised site plan (Exhibit 59(a)) and provide streetscaping and landscaping as specified in its revised landscape plan (Exhibit 59(c)).
8. Petitioner may not post the signs it proposes until it obtains a permit therefor from DPS. A copy of the permit should be filed with the Board of Appeals. Any changes to the signage details shown on Exhibits 55, 59(a) and 59(b) must be submitted to the Board of Appeals for review following Site Plan Review by the Planning Board.
9. Petitioner shall keep dumpsters and outdoor storage areas for waste, fats, oils and grease covered and located so as not to impact upon the storm drain inlets.
10. Deliveries, trash pickup and recycling pickup must be scheduled outside of the peak traffic hours of 6:30 to 9:30 a.m. and 4:00 to 7:00 p.m.
11. Petitioner must obtain and satisfy the requirements of all licenses and permits, including but not limited to building permits and use and occupancy permits, necessary to occupy the

special exception premises and operate the special exception as granted herein. Petitioner shall at all times ensure that the special exception use and premises comply with all applicable codes (including but not limited to building, life safety and handicapped accessibility requirements), regulations, directives and other governmental requirements.

Dated: April 21, 2009

Respectfully submitted,

Martin L. Grossman
Hearing Examiner